1-649

127-649

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 253.

THE FARMERS' LOAN AND TRUST COMPANY AND ELIJAH SMITH, RECEIVER AND TRUSTEE, APPELLANTS,

vs.

HENRY L. NEWMAN, TRUSTEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED JULY 22, 1885.

accession 23858

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 253.

THE FARMERS' LOAN AND TRUST COMPANY AND ELIJAH SMITH, RECEIVER AND TRUSTEE, APPELLANTS,

vs.

HENRY L. NEWMAN, TRUSTEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

INDEX.

	Original.	Print.
Citation	*a*	1
Intervening petition of Newman filed	1	2
Order setting cause for hearing	2	2
Intervening petition of Newman	2	2
Stipulation for hearing and order as to answer	16	8
Answer of Farmers' Loan and Trust Co.	17	9
Replication to said answer	24	11
Cause set down for hearing	25	12
Order extending time for taking testimony	26	12
Stipulation as to proof taken, time of filing amended pleadings, and vacating order setting cause for hearing	27	13
Withdrawal of Grant and Grant, complainants' solicitors, &c.	28	13
Joint answer of Farmers' Loan and Trust Co. and E. Smith, receiver	28	13
Replication to said answer	37	17
Order of continuance by consent	39	18
Intervenor's abstract of evidence	40	19
Receiver's abstract of evidence	52	23
Hearing of cause	55	25
Further hearing and submission	56	25
Submission set aside, cause reargued and submitted	57	26
Opinion of Circuit Judge Brewer	58	26

JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 1, 1887.

	Original.	Print.
Decree in favor of intervenor	67	30
Appeal allowed	69	31
Appeal bond filed and approved	70	31
Appeal bond	71	31
Evidence for intervenors	74	32
Extracts from lease of Lexington, Lake and Gulf Railroad to the Burlington and Southwestern Railway Co. of date February 7, 1872	74	32
Articles of consolidation of Lexington, Lake and Gulf Railroad and the Burlington and Southwestern Railway Co., dated May 16, 1873	75*d*	34
Mortgage of Burlington and Southwestern Railway Co., Linneus branch, to Farmers' Loan and Trust Co., New York, April 1, 1872	93	41
Decree of foreclosure, May 19, 1876, in case No. 297, Farmers' Loan and Trust Co. *vs.* Burlington and Southwestern Railway Co. *et al.*	120	51
Deed of trust of Lexington, Lake and Gulf Railroad Co. to Moses Chapman, trustee, of January 16, 1872	133	56
Deed of M. Chapman, trustee, to Newman, trustee	144	60
Notice of application for authority to borrow money by receiver	150	63
Petition to borrow money	152	64
Amended petition to borrow money	156	65
Answer of Farmers' Loan and Trust Co. *et al.* thereto	160	67
Consent of bondholders	162	68
" "	163	68
Order granting receiver authority to borrow, &c.	165	69
Report of Harry Lacey, special master, of sale	171	72
Exhibit A—Publisher's certificate	178	75
B—Affidavit of publication	181	76
C—Receipt of Thompson to receiver, November 7, 1879	183	77
D—Receipt of McCullough to receiver, November 12, 1879	184	77
E—Receipt of McCullough and Beebe, August 11, 1877	185	78
Master's deed to E. Smith, trustee	185	78
Decree confirming report of sale	190	80
Agreement between H. L. Newman and Elijah Smith, receiver, of March 12, 1880	192	81
Quit-claim deed of Newman *et al.* to Elijah Smith, receiver, March 29, 1880	198	83
Note of Lexington, Lake and Gulf Railroad Co. to Monroe & Co.	202	86
Deed of trust of Lexington, Lake and Gulf Railroad Co. to Moses Chapman, trustee	203	86
Deposition of John W. Noble	214	90
Deposition in part of P. H'y Smyth	222	94
Deposition of Tilton Davis	231	97
Articles of incorporation of the Kansas City, St. Jo and Burlington Railroad Co.	254	106
Report of H. Lacey, master, as to supplemental deed	266	112
Supplemental deed of Lacey, master	268	113

	Original.	Print.
Order of court thereon	272	115
Proceedings in case No. 1377, Smith, receiver, *vs.* Newman *et al.*—		
Bill for injunction	273	115
Order thereon	277	117
Writ of injunction	278	117
Marshal's return	281	118
Answer of E. H. Brown	282	119
J. I. Brooks	284	120
Report of E. Smith, receiver	286	121
Deposition of E. Smith	297	125
Decree appointing E. Smith, receiver, and authorizing issue of certificates	300	127
Evidence for receiver—		
Bill of foreclosure in case No. 297, Farmers' Loan and Trust Co. *vs.* Burlington and Southwestern Railway Co. *et al.*	305	129
Mortgage of Burlington and Southwestern Railway Co., Linneus branch, to Farmer's Loan and Trust Co., New York. (Not set out; see page 93.)	312	132
Decree of foreclosure, May 19, 1876. (Not set out; see page 120.)	312	132
Deposition of E. Smith. (Not set out; see page 297.)	312	132
Report of sale by Lacey, master. (Not set out; see page 171.)	313	132
Deposition of H. Lacey	313	132
Decree appointing Elijah Smith, receiver, and authorizing the issue of certificates of indebtedness. (Not set out; see page 300.)	315	133
Certificate of clerk of United States circuit court, central division, southern district of Iowa, in reference to return and cancellation of receiver's certificates	316	133
Final report of E. Smith, receiver	317	134
Clerk's certificate to transcript	321	135

a & b *Citation.*

THE UNITED STATES OF AMERICA:

The President of the United States to Henry L. Newman, trustee, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington on the second Monday of October next pursuant to an appeal filed in the clerk's office of the United States circuit court for the eastern division of the western district of Missouri, wherein The Farmers' Loan & Trust Company and Elijah Smith, receiver and trustee, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why a decree rendered & passed against the said plaintiffs in error, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable D. J. Brewer, judge of the circuit court of the eighth circuit, this 24 day of January, in the year of our Lord one thousand eight hundred & eighty-five.

DAVID J. BREWER,
Circuit Judge.

c [Endorsed:] 297. The Farmers' Loan and Trust Company *vs.* The Burlington & Southwestern Railway Company *et als.* Henry L. Newman, trustee, intervener. Citation.

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

Thos. E. Bennett, United States deputy marshal for the above district, being duly sworn, says that on the 2nd day of February, A. D. 1885, he served a copy of the within citation upon John W. Noble and upon the firm of Noble & Orrick by leaving a copy — the same with John W. Noble, and also upon Tilton Davis by leaving a copy of the same with him, all at St. Louis, in the above district.

J. E. D. COUZINS,
United States Marshal,
Pr. THOS. E. BENNETT, *Dep'y.*
THOS. E. BENNETT.

Fees & expenses, $7.00.

Subscribed & sworn to before me by said affiant, Thos. E. Bennett, this 2d day of February, A. D. 1885.

WM. MORGAN,
Commissioner U. S. Circuit Court, Eastern District of Missouri.

1 UNITED STATES OF AMERICA, } *sct:*
Eastern Division of the Western District of Missouri, }

Pleas before the honorable circuit court of the United States in and for the eastern division of the western district of Missouri.

THE FARMERS' LOAN AND TRUST COMPANY OF NEW YORK
vs.
THE BURLINGTON & SOUTHWESTERN RAILWAY COMPANY *et al.*
Case No. 297. In Chancery.

Be it remembered that at a regular stated term of the United States circuit court for the eastern division of the western district of Missouri, begun and held at the court-house in Jefferson City, in said division and district, on the 15th day of November, A. D. 1880, the following entry appears of record on March 7th, 1881, an adjourned day of said term, to wit:

Interpleas Filed, Order that Notice be Given, and Cause Set for Hearing

FARMERS' LOAN AND TRUST COMPANY
vs.
BURLINGTON AND SOUTHWESTERN RAILWAY CO. *et al.*
297.

2 This day there is received by mail and filed herein the interplea and demand of Tilton Davis for enforcement of contract; also the interplea and demand of Henry L. Newman, trustee, &c., for enforcement of contract. It is thereupon ordered that complainant's solicitor be notified and said interplea be set down for hearing on the first day of the next term of this court (April 18th, 1881).

And the interplea of said Henry L. Newman, trustee, &c., so filed as aforesaid, is in the words and figures following, to wit:

Interplea of Henry L. Newman, Trustee, etc.

In the Circuit Court of the United States for the Eastern Division of the Western District of Missouri.

THE FARMERS' LOAN AND TRUST COMPANY, Plaintiff,
vs.
THE BURLINGTON & SOUTHWESTERN RAILWAY COMPANY *et al.*, Defendants.
Case No. 297.

Now comes Henry L. Newman, trustee for himself and John W. Waddell, and intervenes and files his interplea in the above-entitled cause, and alleges the following facts constituting his cause of action and rights in said action, and states that on the 7th
3 day of February, 1872, the Lexington, Lake and Gulf Railroad Company (a corporation of this State) leased its road and property to the Burlington and Southwestern Railway Company for and in behalf of the Linneus Branch of said Burlington & Southwest-

ern Railway Company, which said lease is fully set forth and shown by the papers & proceedings filed and had and done in said action aforesaid, and to which reference for full particulars is here had and made and said lease made part of this complaint and interplea.

That on or about the first day of April, 1872, said Burlington & Southwestern Railway Company, for and on behalf and in the name of the Linneus Branch of said last-named company, and of which said branch said Lexington, Lake and Gulf Railroad Company, by the terms and stipulations of said lease — made and constituted an important part thereof, executed and issued 1,600 bonds of $1,000 each, and that, to secure payment of said bonds, said Burlington and Southwestern Railway Company, for and in behalf of said branch, executed and issued a mortgage upon all the property of said branch, including said leased premises, all of which will more fully appear from the bill and amendment, exhibits, records, and proceed-
4 ings had and done in said action aforesaid, and to all which reference is here had and made as part of this complaint & plea of said intervener.

That, default being made in the payment of said bonds & coupons, as stipulated, proceedings in foreclosure were had in said cause, and at the April term of this court, 1876, a decree of foreclosure of said mortgage was had; and, pending said proceeding, Elijah Smith was appointed receiver of said Burlington & Southwestern Railway Company for said branch; and also, on the 26 day of January, 1880, under and pursuant to the orders of this court and on the application of said receiver and the petition of the owners and holders of the bonds secured by said mortgage and embraced in said suit, the said receiver was authorized and empowered, among other things in said order mentioned, to settle and adjust, by payment or otherwise, any outstanding claims against said Lexington, Lake and Gulf Railroad Company which to him, said receiver, may or might seem proper and right in the premises; all of which will more fully appear from the records, pleadings, & proceedings on file and had and done is said cause and hereby refer-ed to, and all of which are made part hereof.

5 That said Lexington, Lake and Gulf Railroad Company, prior to the date of said lease, being indebted for the construction of said road in the sum of about twenty thousand dollars, gave in part settlement of its said indebtedness its promisory note to Monroe & Co., contractors, for about the sum of eleven thousand dollars, and to secure the same, on the 16 day of January, 1872, made, executed, and delivered a deed of trust to secure said debt, & which said deed of trust embraced and covered the entire property, franchises, matters, and things of said Lexington, Lake and Gulf Railroad Company, and which said deed of trust was made and recorded prior to the said lease of said property of said Lexington, Lake & Gulf Railroad Company to the said Burlington, Southwestern Railway Company as aforesaid.

That said Newman became the holder and owner of said note as aforesaid, and that the said Lexington, Lake & Gulf Railroad Company, as also said Burlington and Southwestern Railway Company,

failing to pay said note secured by said deed of trust as aforesaid, under the terms and stipulations of said deed of trust said property was sold and the said Newman, as trustee for himself and said John W. Waddell, became the purchaser of said property therein described, embracing the property of said Lexington, Lake
6 and Gulf Railroad Company so leased to said Burlington and Southwestern Railway Company for its said Linneus Branch as aforesaid.

That the said debt evidenced by said note aforesaid was in part for the construction of said Lexington, Lake and Gulf Railroad and was secured by mortgage prior to the said lease and mortgage placed upon said property by said Burlington & Southwestern Railway Company for and in behalf of its said Linneus Branch as aforesaid.

That said Linneus Branch of said Burlington & Southwestern Railway Company was composed of the property of said branch north of the Missouri river and said Lexington, Lake and Gulf railroad south of the river, and all as set forth in said lease as aforesaid, and was jointly embraced in the said mortgage securing the said 1,600 bonds, amounting to the sum of one million six hundred thousand dollars as aforesaid.

That with the view to the payment and settlement of said claim of the said Newman aforesaid and to quiet and perfect the title to said Lexington, Lake and Gulf railroad to said Burlington & Southwestern Railway Company, as contemplated by said lease and
7 mortgage as aforesaid & under the said order of this court, said Elijah Smith, as receiver for said company as aforesaid, on the 12 day of March, 1880, made with said Newman, trustee as aforesaid, his certain agreement and in words & figures following, to wit:

This agreement, made and entered into this 12th day of March, 1880, by and between Elijah Smith, as receiver of the Burlington and Southwestern Railway Company, acting under authority of the circuit court of the United States in and for the western district of Missouri, in a certain suit therein pending, in chancery, wherein The Farmers' Loan and Trust Company of New York is plaintiff and said Burlington and Southwestern Railway Company and others are defendants, party of the first part, and Henry L. Newman, as trustee for himself and John W. Waddell, party of the second part, witnesseth:

That in consideration of the covenants and agreements on the part of the first party, hereinafter named, said party of the second part covenants and agrees to convey to said party of the first part as said receiver, by quitclaim deed and not otherwise, all the right, title and interest now held by him or vested in him, said party of the second part, in and to the railroad and property, appurte-
8 nances, and franchises of what was formerly known as the Lexington, Lake and Gulf railroad, extendinging southwardly from the Missouri river, at Lexington, Missouri, by the way of Pleasant Hill, to a point south of Butler, in Bates county, Missouri; said deed to be made within twenty days from the date hereof and

be placed in the hands of John W. Noble, of the city of St. Louis, Missouri, in escrow, and to be delivered by said Noble to said party of the first part upon the compliance with the terms of this agreement on the part of said receiver, and which said deed shall be executed by said party of the second part and his wife, and also by said John W. Waddell and his wife, and said conveyance shall include all the rights and interest acquired by said Newman and Waddell under a certain trust deed made by the Lexington, Lake & Gulf Railroad Company, of date January 16th, 1872, to Moses Chapman, trustee, and the sale thereunder by said trustee, of date February 20th, 1877, except as hereinafter provided, and also release of all claims and demands of said Newman & Waddell of every kind against said Lexington, Lake and Gulf Railroad Company so as to substitute said receiver to the same rights as are now held by either said Newman as trustee, or said Waddell, or in any other manner.

And in consideration of the premises the said party of the
9 first part agrees, as receiver as aforesaid, to pay to said Newman out of the moneys coming into his hands from that part of said railroad hereinbefore mentioned, or from the sale of receiver's certificates lately authorized by said court to be issued by said receiver, or from any earnings from that portion of said road, or arising from the sale thereof, under the decree of said court and within nine months from the eighteenth day of November, 1879, the sum of seventeen thousand seven hundred and fifty dollars, it being recognized and admitted in this settlement that the claim of said Newman to the above amount is a first and prior lien upon said portion of said railroad paramount to the mortgage to said Farmers' Loan and Trust Company; but this agreement is not to bind the receiver in reference to any other property or money coming into his hands except from or pertaining to that part of the property aforesaid acquired from the Lexington, Lake and Gulf Railroad Company.

And it is further agreed that the fulfilment of this agreement by both parties shall constitute a full settlement of all matters and differences between said parties hereto, as well as of all rights and liabilities of said Newman and Waddell in and to or on account
10 of any property of said Lexington, Lake and Gulf Railroad Company or connected with said road, and of any demand, right, or claim of said first party or said Lexington, Lake and Gulf Railroad Company against said second party, for himself or said Waddell, or either of them, for any ties, iron, or other property moved or disposed of by said Newman or Waddell or others associated with them or acting under their authority or direction; but this is not to be so construed as to bar the right of the receiver to assert any title to any of said property now held by other persons then those herein named by virtue of the rights acquired by him through the mortgage to the Farmers' Loan and Trust Company.

And it is further mutually agreed by and between the parties hereto that time is of the essence of this contract, and that in case said second party shall fail to comply on his part with the stipulations hereof said first party may have the right to have the same enforced specifically by the court in which said cause is pending, or

at his option declare this agreement absolutely null and void; and if said first party shall fail within said nine months from December 18, 1879, to pay said $17,750 said second party may apply to
11 said court for the enforcement thereof, or at his option he may abrogate or abandon the same absolutely, & his rights in that event shall be the same as if this contract had not been made.

And it is distinctly understood that this agreement is made by said receiver under an order of said court, and refers to no other than said property before mentioned, and is to be paid out of no funds except such as arise from said portion of said road, and is to constitute no personal or individual claim against said Elijah Smith.

It is further understood and agreed that when said quitclaim deed shall be delivered in escrow to said Noble that the note mentioned and described in the said trust deed to Moses Chapman under which said Newman's claim arises shall be delivered to said Noble also in escrow, and said trust deeds shall also be delivered to him if in the possession of parties; if not, as soon as practicable; and on the compliance of the receiver with his part of this agreement said note and said trust deed shall be delivered to him with the said quitclaim deed as muniments of his title and as vouchers, said not- to be canceled upon payment of said $17,750.00.

12 Said Newman represents that he has not made, nor said Waddell, nor any person acting under their authority, any disposition of the grade or right of way purchased under said deed of trust, except about three miles in La Fayette county to the Kansas City & St. Louis and Chicago & Alton Railroad Company.

In testimony whereof the said parties have hereunto set their hands and seals this the day and year first above mentioned.

ELIJAH SMITH,
Rec'r of the Burlington & Southwestern R'way Co.,
Linneus Branch.
HENRY L. NEWMAN, [SEAL.]
Trustee for Himself & John W. Waddell.

Attest: TILTON DAVIS.

The intervener herein states that pursuant to the terms of said contract and agreement he has executed and delivered the said deed as set forth in said contract, as also has said John W. Waddell, and as well as the wives of said parties, Newman and Waddell, and that the same was placed in the hands of said Noble as stipulated in said contract, and is now held by said Noble in escrow as per said contract and agreement, and also that said note and deed of trust were also placed in the hands of said Noble, and are now held by him as agreed and stipulated, and that each and every matter
13 and thing has been done by said Newman and Waddell as contemplated by said contract and agreement, and that each and every of the stipulations in said contract on the part of the complainants herein has been performed and done.

That on the 30 day of November, 1880, said Linneus Branch road, including said property, franchises, rights, and premises of said Lexington, Lake and Gulf railroad, under said decree in said cause and the proceedings therein had & done, were sold by the special master in chancery, Harry Lacy, at Unionville, Missouri, and at which said sale said Elijah Smith, as trustee for said bondholders of said branch line, became and was the purchaser at & for the sum of one million of dollars, and that said property was sold in gross, including all the property described and covered by said mortgage of said Burlington and Southwestern Railroad Company, for said branch as aforesaid, and covering and embracing said property of said Lexington, Lake and Gulf railroad as aforesaid; all of which will fully appear by the report of said sale made by said special master and deed thereto made and filed for approval by this court, and hereby refer-ed to and made part hereof.

Complainant says that said sum of seventeen thousand
14 seven hundred and fifty dollars stipulated and agreed to be paid by said contract so made as aforesaid has not been paid, nor any part thereof, although said receiver has been often requested so to do.

That said sum, evidenced by said contract, still remains unpaid, due, and owing as set forth in said contract, the original whereof is in the hands of said Smith, as stipulated therein, & wherefore the same is not filed herewith, but duplicate will be filed herewith if required by the court; that the said receiver is seeking to have said sale and purchase confirmed and approved by this court, and wherefore complainant comes and intervenes and asks to file this his plea in that behalf, and demands that said contract and agreement be enforced, and that before any order be made confirming & approving said sale that said receiver be ordered and required to pay out of the proceeds of said sale so made and purchase of said property as aforesaid the said sum of seventeen thousand seven hundred and fifty dollars, and interest thereon from the eighteenth day of September, 1880, at the rate of six per cent. per annum, and for such other or further relief as to the court shall seem proper, with costs of action to be charged in said cause, and to the end that justice may be done.

15 TILTON DAVIS,
Attorney for Intervener.

And afterwards, at a regular stated term of said court, begun and held at the city of Jefferson, in said division and district, on Monday, the 18th day of April, A. D. 1881, the following further proceedings were had in the above-entitled cause on the 20th day of April, 1881, an adjourned day of said term, to wit:

Stipulation as to Time of Hearing, &c.

FARMERS' LOAN AND TRUST CO.
vs.
BURLINGTON AND SOUTHWESTERN R'Y CO. *et al.* } 297.

In the matter of the interplea of Tilton Davis and Henry L. Newman, trustee, &c., for enforcement of contract.

This day come the parties, by their respective solicitors, the complainant, by Whit. M. Grant, Esqr.; the receiver of the Burlington and Southwestern Railway Company, by L. T. Hatfield, Esqr., and the interpleaders, by Tilton Davis, Esqr.; thereupon a stipulation is filed, signed by counsel, agreeing that this case shall be called up for hearing on the 28th inst., or sooner, if agreed to in writing, and further agreeing that no steps will be taken looking to the
16 confirmation of the sale of the property described in the decree in this case.

And the stipulation so filed as aforesaid cannot be found among the files in this cause.

And afterwards, at the said regular stated April term, 1881, of said court, begun and held as aforesaid, the following further proceedings were had in the above-entitled cause on the 28th day of April, A. D. 1881, an adjourned day of said term, to wit:

FARMERS' LOAN AND TRUST COMPANY
vs.
BURLINGTON AND SOUTHWESTERN RAILWAY CO. } 297.

In the matter of the interpleas of Tilton Davis and Henry L. Newman, trustee, &c., for enforcement of contract.

Upon motion of L. T. Hatfield, Esqr., solicitor for Elijah Smith, the receiver herein, leave is granted said receiver to answer the said interpleas within sixty days from this date.

And afterwards, in vacation of said court, and on the 27th day of June, A. D. 1881, the following further entry appears of record in the above-entitled cause, to wit:

Answer Filed.

17 FARMERS' LOAN AND TRUST COMPANY
vs.
BURLINGTON AND SOUTHWESTERN RAILWAY CO *et al.* } 297.

In the matter of the interpleas of Tilton Davis and Henry L. Newman, trustee:

This day there is received by mail and filed herein the answer of complainant to the interpleas of Newman, trustee, and Tilton Davis.

And the answer so filed as aforesaid is in the words and figures following, to wit:

Answer of Farmers' Loan & Trust Co.

In Circuit Court U. S., E. D., West. Dist. Mo.

THE FARMERS' LOAN & TRUST CO.
vs.
THE BURLINGTON & SOUTHWESTERN RAILWAY CO. *et al.* } Eq. No. 297.

Trustee's answer to intervention Davis & Newman, trustee.

Now come the Farmers' Loan & Trust Company, trustee, complainant in the above-entitled cause, and shows to the court that the decree of foreclosure was entered in this cause on May 19th, 1876, and the property sought to be foreclosed herein sold by the master thereunder November 30th, 1880, and the petition of said Davis & Newman, trustee, *were* filed herein March 16th, 1881, and
18 the said petitioners are therefore too late to become parties to said cause for the purpose sought or for any purpose whatever, and the said trustee hereby objects to & protests against the same; and the said trustee, saving and reserving all and all manner of exception to the manifold errors and insufficiencies in said petition contained & to the time of filing the same and for answer thereto, or to so much thereof as they are advised it is material to answer unto, says:

1st. Admits the execution of the lease referred to with the L., L. & G. R. R. Co.

2nd. Admits the execution of the mortgage referred to.

3rd. Admits the default, commencement of foreclosure, & the decree referred to.

4th. Have no knowledge of the order of January 26th, 1880, referred to; therefore deny & demand proof of same, but deny that said order was intended to or did authorize the making by the receiver of the contract herein sought to be taken advantage of, & allege that if such order was made it was without notice to said trustee; was *ex parte;* was not within the scope of the powers and duties of said receiver, and was & is as to this trustee utterly null & void.

19 That said contract was not for the benefit or advantage of said property or this trustee. It has derived no benefit therefrom. Said contract was not authorized by the court or approved by it after made; was entirely without authority, & is absolutely null & void.

5th. Has no knowledge of the indebtedness or lease of said L., L. & G. R. R. Co. referred to for construction or otherwise; therefore deny &, if material, demand proof.

6th. Has no knowledge of said Newman being the holder of one of said notes or that said L., L. & G. or B. & S. W. R'y Co. have failed to pay the same &, if material, demand proof.

7th. Has no knowledge of said property being sold under said alleged trust deed & of said Newman being the purchaser thereof; therefore deny &, if material, demand proof.

8th. Has no knowledge as to said note being for construction of said L., L. & G. R. R. & of said mortgage to secure the same being prior to said lease to B. & S. W. R'y Co. & deed of trust to complainant; therefore deny &, if material, demand proof.

9th. Has no knowledge of the making of the said agreement of March 12th, 1880; therefore deny the same; deny that the same was made by order of this court, except as hereinbefore stated,
20 & allege that the same, if made, was never approved by this court; was without the scope & duties of said receiver by virtue of his appointment as such receiver; was *ex parte* & without the knowledge or consent of this trustee; was not to their interest or the interest of said property; they have not ratified or adopted the same or derived any advantage therefrom; the same is absolutely repudiated; is a nul-ity & has no binding force & effect whatever, either upon this trustee or said property, and is utterly null & void.

10th. Knows nothing of the execution of said deed & placing same in escrow with one Noble, or of the other things alleged to have been done; therefore deny &, if material, demand proof; deny that said petitioners have been put to any trouble or expense, or that they have waived or lost any right under and by virtue of said alleged contract or their action thereunder; that they would not have done without the same; that they know of the want of authority in said receiver to make the same & are bound thereby.

11th. Admits the sale of said property herein as alleged.

12th. Has no knowledge of the amount due petitioners
21 under said alleged contract or what has or has not been paid, and deny the allegations in relation thereto &, if material, demand proof.

13th. Complainant makes the foregoing answer, so far as applicable, an answer to the petition of Tilton Davis, and for further answer say they have no knowledge of what was due said Davis on the note as alleged & deny the allegation of said petition in relation thereto &, if material, demand proof.

14th. Has no knowledge of the execution of the contract named between said Davis & said receiver; therefore deny the same & demand proof & allege that said receiver had no authority to make the same; it was not in his powers as receiver; it was not approved by the court; was not proper to be made; is not binding on this trustee or said property, & is utterly null & void.

15th. It is not true that no certificates of indebtedness have been issued by the receiver herein in accordance with the previous orders of this court, & complainant hereby refers to the orders, reports, &c., herein for greater certainty in reference thereto.

16th. It is not true that property said L., L. & G. R. R. sold for $600,000 *or* was worth that sum when said Davis' alleged con-
22 tract was made or that the same constituted a large & important part of the value of the property securing the bonds foreclosed herein.

17th. Has no knowledge as to whether said alleged sum of $5,000 has been paid petitioner or any part thereof; it is true said receiver

has not paid same & had no power or authority so to do, and deny that the same is due from complainant or is a lien upon said property or any funds under its control.

18th. Denies each and every other allegation in said petitions & each of them not hereinbefore specially admitted or denied.

And, for further answer, complainant refers to its bill & amended bill & exhibits herein & makes the same part hereof to show its right to said property & the relation it bears to same & the dates of its mortgage & contracts, &c.

And shows to the court that whatever rights petitioners have under & by virtue of their said alleged contracts — are not interfered with by this foreclosure it they have a prior mortgage & lien, as they assert their rights are not affected & they can enforce the same in the proper tribunal & cannot come into this case.

23 That said alleged contract with said receiver was without authority & absolutely null & void & not binding on this trustee or said property, & their remedy, if any, is against the party with whom said alleged contracts was made.

Wherefore they pray to have said petitions dismissed with costs.

FARMERS' LOAN & TRUST CO., *Trustee*,
By GRANT & GRANT, *Its Sol's.*

And afterwards, at the said regular stated April term, 1881, of said court, begun and held as aforesaid, the following further proceedings were had in the above-entitled cause on the 5th day of July, 1881, an adjourned day of said term, to wit:

Replication Filed.

FARMERS' LOAN AND TRUST CO.
vs.
BURLINGTON AND SOUTHWESTERN RAILWAY CO. } 297.

In the matter of the interpleas of Henry L. Newman, trustee, and Tilton Davis.

This day come the interpleaders herein, by Tilton Davis, Esqr., their solicitor, and files replication to the answer of the com-
24 plainant in the above cause, and the replication so filed as aforesaid is in the words and figures following, to wit:

Reply.

FARMERS' LOAN & TRUST COMPANY OF NEW YORK,
Complainant,
vs.
THE BURLINGTON & SOUTHWESTERN RAILWAY CO. &
Others, Respondents. } In Chancery.

Now come Tilton Davis and Henry L. Newman, trustee, &c., and, for replication to the new matters alleged in the pretended answer of the said Farmers' Loan & Trust Co., complainant herein, & deny

severally each and every allegation therein contained contrary to the allegations and statements set forth in the petitions of said Davis & Newman, respectively.

TILTON DAVIS,
Per Se & Att'y for H. L. Newman, Trustee, &c.

And afterwards, at the said regular stated April term, 1881, of said court, begun and held as aforesaid, the following further proceedings were had in the above-entitled cause on the 6th
25 day of July, 1881, an adjourned day of said term, to wit:

Cause Set Down for Hearing.

FARMERS' LOAN AND TRUST COMPANY
vs.
BURLINGTON AND SOUTHWESTERN RAILWAY CO. } 297.

In the matter of the intervening petitions of Tilton Davis and Henry L. Newman, trustee.

This day come the parties, by their solicitors, the complainant by Whit. M. Grant, Esqr., and the interveners by Tilton Davis, Esqr.; thereupon, by consent, it is ordered that the hearing of this case be set for the third day of the November term, 1881.

And afterwards, in vacation of this court and on the 27th day of October, A. D. 1881, the following further entry appears of record in the above-entitled cause, to wit:

This day the following order was received by mail and filed:

Order Extending Time for Taking Testimony, &c.

In the United States Court at Jefferson City, Missouri. In Chancery.

FARMERS' LOAN AND TRUST COMPANY OF NEW YORK,
Complainant,
vs.
THE BURLINGTON & SOUTHWESTERN RAILWAY COMPANY
et al., Respondents. } Case 297.

26 Now come the complainants & interveners, Henry L. Newman, trustee for himself, and John W. Waddell, and also Tilton Davis, by attorney, Tilton Davis, & make application for an enlargement of time for taking proof under the issues in said cause, and, such application being considered, it is hereby ordered that the time for taking such proof on behalf of said Newman, trustee, & said Davis be enlarged and extended for the period of sixty days from this date, and that the clerk of this court issue commission to take depositions of witnesses in said cases at such time and place as shall be authorized by the rules of this court and determined upon in that behalf.

This Oct. 26, A. D. 1881.

(Signed) A. KREKEL, *Judge.*

And afterwards, at a regular stated term of said court, begun and held at the court-house in the city of Jefferson, in said division and district, on the 21st day of November, A. D. 1881, the following further proceedings were had in the above-entitled cause on said 21st day of November, 1881, the first day said term, to wit:

27 *Stipulation as to Proof Taken, Time of Filing Amended Answer, and Vacating Order Setting Case for Trial.*

FARMERS' LOAN & TRUST CO.
vs.
BURLINGTON AND SOUTHWESTERN R'Y CO. } 297.

In the matter of the intervening petitions of Henry L. Newman, trustee, &c., and Tilton Davis.

This day there is received and filed herein a stipulation that the testimony taken before D. Robert Barclay, Esqr., on the 18th and 19th days of November, 1881, may be used in both of the cases; that the Farmers' Loan and Trust Company and Elijah Smith, receiver, have until the 12th day of December, 1881, to file an amended answer, and that the order heretofore made setting the cases for hearing be vacated.

And said stipulation so filed as aforesaid cannot be found among the files in this cause.

And afterwards, to wit, at the said regular stated November term, 1881, of said court, begun and held as aforesaid, the following further entry appears of record in the above-entitled cause on the 22nd day of November, 1881, an adjourned day of said term, to wit:

28 *Withdrawal of Grant & Grant, Solicitors for Complainant.*

FARMERS' LOAN AND TRUST CO.
vs.
BURLINGTON AND SOUTHWESTERN R'Y CO. } 297.

This day comes Whit. M. Grant, Esqr., and withdraws the appearance of Messrs. Grant and Grant, as solicitors for the complainant in this cause, in the matter of the intervening petitions of H. L. Newman, trustee, &c., and Tilton Davis.

And afterward, in vacation of said court and on the 9th day of December, A. D. 1881, the following further entry appears of record in the above-entitled cause, to wit:

Joint Answer of F. L. & T. Co. & E. Smith, Rec'r, Filed.

FARMERS' LOAN & TRUST CO.
vs.
BURLINGTON & SOUTHWESTERN R'Y CO. } 297.

This day there are received and filed herein the joint answers of the Farmers' Loan & Trust Co. & Elijah Smith, receiver of the

Burlington and Southwestern R'y Co., to the intervening petitions of H. L. Newman, trustee, &c., and Tilton Davis.

And the answer so filed as aforesaid is in the words and figures following, to wit:

Joint Answer of Farmers' L. & T. Co. & E. Smith, Receiver.

In the United States Circuit Court, Western District of
29 Missouri, East. Division.

THE FARMERS' LOAN & TRUST CO., Complainants,
vs.
THE BURLINGTON & SOUTHWESTERN RAILWAY CO. *et al.*, Defendants. } Equity, 297.

In the matter of the intervening petition of Henry L. Newman.

Amended answer of trustees, complainants & receiver.

And now comes the said trustees and Elijah Smith, receiver, and, for amended answer to the intervening petition of Henry L. Newman, say it is admitted that the L., L. & G. Railroad Company leased its road and property to the Burlington & Southwestern Railway Company for and in behalf of its Linneus Branch, as stated; and it is also true that said company issued its bonds on said branch, as stated, and made a mortgage on the entire branch line, including the said L., L. & G., to secure the same; that said bonds were issued under a mortgage to secure the same, as stated, and that the bill in this case was filed to foreclose said mortgage, and said Elijah Smith was appointed receiver, as stated; and at the April term, 1876, a decree of foreclosure was duly passed and enrolled; it is true
30 that an order was made by this court, at chambers, on the 20th day of March, 1880 (and not January 26th, 1880), whereby said receiver was authorized to settle and adjust, by payment or otherwise, any outstanding claims against the said Lexington, Lake and Gulf Railroad Company which seemed to be prior in right to the claims of the Burlington & Southwestern Railroad Company; and these defendants beg leave to refer to said order, now of record in this court, for greater certainty, and to make the same part of this answer; it is admitted that said Lexington, Lake & Gulf Railroad Company was, prior to said lease, indebted to the intervening petitioner, Henry L. Newman, in the sum of about ten or eleven thousand dollars, and that a deed of trust was executed about the 16th day of January, 1872, to secure the same, as stated in said bill, covering the entire property of said Lexington, Lake & Gulf Railroad Company, and that said decree of trust is and was prior in point of both time and right to the mortgage to the complainants, the Farmers' Loan & Trust Company; it is also admitted that the indebtedness to said Newman was not paid by either the L., L. & G. or the said B. & S. W., and that the trustee named in said trust deed did sell the same, and that said Newman became the purchaser
31 thereof, but it was all done after the appointment of the said receiver by this court.

As to what said debt evidenced by said note and trust deed arose out of complainants and receiver are not informed, and can neither admit or deny the same.

It is admitted that said L., L. & G. R. R. was leased for and in behalf of said Linneus Branch and was included in the mortgage to complainants as a part of said branch under the provisions of the said lease; and it is surely true that the said receiver made and entered into the contract with said Newman, of date March 12th, 1880, and fully set out and referred to by copy in the interplea said Newman filed herein; and it is not denied or admitted that said Newman executed and delivered the deed therein mentioned in escrow to John W. Noble as therein provided, but said Newman is left to his proof in that behalf, if the same be material.

It is true that under the decree of this court, hereinbefore referred to, said branch railroad was sold by the special master, Harry Lacy, on the 30th day of November, 1880, and in pursuance of said decree.

It is also true that at said sale Elijah Smith, acting as agent for the trustees, complainants herein, and for the bondholders, did at said sale purchase the said property of said branch line, and
32 the same was conveyed to him, as trustee, for and in behalf of the owners of the bonds aforesaid; all of which property included in the said mortgage was sold by said master and purchased by said Smith as aforesaid, but the bid therefore was payable in the bonds secured by said mortgage, as authorized in said decree; but complainants say that said bid was made solely with a view to the value of the finished portion of said road upon which the money realized from said bonds was expended, and with the knowledge that whatever title said purchaser would take under said sale would be subject to the lien of said Newman under his said trust deed; that no part of said bid was to be paid or was paid in cash, and that said bid was made in satisfaction of said mortgage debt *pro tanto*, and was paid to the master in acknowledgment of satisfaction to the extent thereof of the said debt due to the trustees by reason of said mortgage; that there was no money bid for said property and none paid over to said master and non- required to be; that at the time said decree was entered, in 1876, the said Newman was not a party to said foreclosure proceedings nor had his claim in any manner been presented to this court or adjudicated as a lien, and there was no order to sell said property in
33 satisfaction thereof, so that the said Smith at said sale simply took said property for his beneficiaries, the bondholders, subject to such liens as existed on said L., L. & G. R. R. prior and superior to said mortgage.

Complainants and receiver further say that it was expressly understood in the agreement made between said Newman and the receiver that it was admitted that the claim of said Newman was a first and prior lien upon the property of said L., L. & G. R. R. over the mortgage of complainants, and that the agreement was not to bind the receiver in reference to any other property or money coming into his hands, except such as should come from said L., L. &

G. R. R.; that payment to said Newman was only to be made by the receiver out of the moneys coming into his hands from either the sale of certificates ordered by this court to be issued on that part of the road from the earnings of said L., L. & G. R. R. or arising from the sale of said road under said decree.

And complainants and receiver say that none of the said receiver's certificates were ever sold and none could be; that no money whatever came into the receiver's hands from any earnings of said roads; that, in fact, said road never was built or operated over the
34 line of the said L., L. & G. —, and there never were any earnings, nor did any money ever come into the receiver's hands from the sale of said part of said road; that the moneys payable on the sale of said road were not payable to the receiver, but to the master; but no money whatever was realized by the master upon said sale, and therefore there never was any funds from either source mentioned in the agreement by which the receiver could pay off the amount mentioned in said agreement.

These respondents to said interplea further say that said sale by said master was duly reported to this court and said report was confirmed, reserving, however, the rights of other persons claiming liens upon said property; that said Newman never in any manner became a party to the proceedings herein until long after said sale; therefore said sale was not made for his benefit nor in his behalf, nor were his rights in any manner affected thereby.

These complainants and the receiver, further responding to said intervening petition of said Newman, say that they do not in any manner controvert the right of said Newman to now have his said claim established as a first and prior lien or mortgage, superior to that of the Farmers' Loan and Trust
35 Company, so foreclosed as aforesaid, and his right to have the property of said Lexington, Lake & Gulf railroad subjected to the payment thereof, and an order of this court ordering the same to be sold and conveyed for that purpose, and do not controvert his right to stand in the position of a first mortgagee; but they deny that said Newman is entited to have an order on said receiver or on the trustee requiring them to pay out money in satisfaction of his debt over and above their own claim as second mortgagees, and on account of which the said purchase was made as aforesaid, and deny that said Newman is entitled to the relief prayed for in his said bill or interplea; and now, having fully answered, complainants and said receiver ask that said prayer be denied so far as the prayer for an order for the payment of said sum of money by the receiver or complainants is concerned.

P. HENRY SMYTH,
Solicitor & Counsel for Complainants and the Receiver.

THE STATE OF IOWA, }
Des Moines County, } *ss*:

I, Elijah Smith, being duly sworn, on my oath do say that
36 I am the receiver of the B. & S. W. R'y Co. referred to in the foregoing answer and the intervening petition of Henry L

Newman; that I have heard the said answer read over, and the statements of the said answer are true to the best of my knowledge and belief.

ELIJAH SMITH.

Subscribed & sworn to before me this 5th day of December, A. D. 1881.

[L. S.] H. B. SCOTT,
Notary Public.

And afterward, to wit, at the said regular stated November term, A. D. 1881 of this court, begun and held as aforesaid, the following further proceedings were had in the above-entitled cause on Tuesday, the 7th day of March, 1882, an adjourned day of said term, to wit:

Replications Filed.

FARMERS' LOAN & TRUST CO.
vs.
BURLINGTON & SOUTHWESTERN R'Y CO. *et al.* } 297.

In the matter of the intervening petitions of Tilton Davis and Henry L. Newman, trustee.

This day there are received and filed herein the replications of Tilton Davis and H. L. Newman, trustee, to the amended an-
37 swer of the Farmers' Loan & Trust Company and Elijah Smith, receiver.

And the replication of said Newman, trustee, &c., so filed as aforesaid, is in the words and figures following, to wit:

Replication.

In the United States Circuit Court, Eastern Division of the Western District of Missouri.

THE FARMERS' LOAN & TRUST COMPANY, Complainants,
vs.
THE BURLINGTON AND SOUTHWESTERN RAILWAY CO. *et al.*, Respondents.

In the matter of the intervening petition of Henry L. Newman, trustee, &c.

And now comes said Henry L. Newman, trustee for himself and John W. Waddell, and files his replication to the amended answer of said Farmers' Loan & Trust Company and Elijah Smith, respondents, as follows:

Said repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of said amended joint answer of said defendants, for replication thereunto saith—

38 That he will aver and prove his said bill and interplea to be true, certain, and sufficient in the law to be answered unto,

and that the said answer of said respondents and defendants is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained material or effective in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and prays as in and by his said bill & complaint he hath already prayed.

TILTON DAVIS,
Solicitor & Counsel for Henry L. Newman, Interpleader, &c.

And afterward, at the regular stated November term, 1882, of this court, begun and held at the city of Jefferson, Missouri, on the third Monday in November, A. D. 1882, the following further entry appears of record in the above-entitled cause on Friday, the first day of December, 1882, an adjourned day of said term, to wit:

39 *Continuance.*

FARMERS' LOAN & TRUST CO.
vs.
BURLINGTON & SOUTHWESTERN R'Y CO. *et al.* } 297.

In the matter of the intervening petitions of H. L. Newman & T Davis.

In pursuance of a stipulation this day filed it is ordered that this cause be continued until the next term of this court.

And the stipulation so filed as aforesaid is in the nature of a telegram, in the words and figures following, to wit:

Stipulation.

ST. LOUIS, MO., *November 30th*, 1882.

H. C. Geisberg, cl'k U. S. C. c't:

Newman & Davis against Smith, receiver, postponed by stipulation.

P. HENRY SMYTH.
TILTON DAVIS.

And afterwards, in vacation of this court and on Tuesday, the 10th day of April, 1883, the following further entry appears of record in the above-entitled cause, to wit:

Interveners' Abstract Filed.

FARMERS' LOAN & TRUST CO.
vs.
BURLINGTON & SOUTHWESTERN R'Y CO. *et al.* } 297.

In the matter of the intervening petitions of Newman and Davis:

40 This day there is received and filed herein an abstract of evidence on behalf of the interveners, as required by rule of court.

And the abstract of evidence so filed as aforesaid is in the words and figures following, to wit:

Interveners' Abstract of Evidence.

In the U. S. Circuit Court for the Eastern Division of the Western District of Mo.

THE FARMERS' LOAN & TRUST COMPANY, Complainants,

vs.

THE BURLINGTON & SOUTHWESTERN R'Y Co. *et al.*, Respondents.

In the matter of the intervening petition of Henry L. Newman, trustee, &c.

Now comes Henry L. Newman, interpleader in said cause, & files this his abstract of the evidence upon which he relies in said cause, and states that the material portions of such evidence he wishes offered in his behalf in addition to that which is admitted in the answers of respondents, trustees and receiver, in this behalf and to which he particularly desires to direct the attention of the court is as follows:

41 First. That portion of said lease of Feb'y 2, '72 which recites as follows:

Article 2nd. That the said party of the second part (to wit, the B. & S. W. R'w'y Co.), for itself, its successors and assigns, in the name of and for and in behalf of said Linneus Branch, covenants & agrees with said party of the first part (to wit, the L., L. & G. R. R. Co.), its successors & assigns, that it, the said party of the second part as aforesaid, will, within two years from the 1st day of January, 1872, cause to be constructed & have ready for operation said Linneus Branch from said town of Unionville as aforesaid to the Missouri river opposite said city of Lexington."

Also that portion of said lease which recites:

"That the said Linneus Branch & the premises & property hereby leased & demised be & constitute one line of railroad and one common property, & shall be regarded as such & included in one common mortgage," &c.

Also: "And that it is hereby mutually agreed & understood between the parties hereto that said line of road hereby leased and the said Linneus Branch of said B. & S. W. R'y from Unionville southwardly as aforesaid shall for the purpose of said mort-

42 gage or trust deeds as aforesaid, and for the purpose of said lease & article expressed, be & constitute to all intents & purposes one line of road and one common property, & for that purpose shall be known and designated as the "Linneus Branch of the B. & S. W. railway." * * *

"That all stock heretofore issued by said first party & all that it may issue hereafter & all that heretofore & hereafter to be issued to aid in the construction and in the name of said Linneus Branch shall be placed upon the same footing & be considered as one com-

mon stock, and in all respects the stockholders in said roads, whether corporations, individuals, or otherwise, shall be entitled to share *pro rata*," &c.

"And the said party of the 2nd part, in the name & for such branch, agrees & covenants that it will commence the laying of iron on the said leased premises at Lexington, Mo., within five months from the 1st day of Feb'y, 1872, & prosecute said work in good faith & to complete the same & run its cars to said city of Butler through means to be realized by the sale of the first-mortgage bonds placed upon said premises.

"And that said property hereby leased is free from all liens
43 & incumbrances & debts except about $15,000 due contractors, and that said leased property was, at the date of said lease, graded and bridged for the distance of about 83 miles, & 40 miles tied and ready for the iron, at a cost of about $575,000, as per stock subscribed & issued."

Intervener also asks attention to that part of the mortgage placed on said leased property and as shown by the mortgage on said branch of date of Ap'l 1, 1872, whereby said leased property is made part in entirety of said branch line and included in said mortgage.

And also intervener asks to offer the record showing the decree of foreclosure of said mortgage in so far as the same affects said property & recognizes the same as part and parcel of said Linneus Branch.

Intervener also offers to read the deed of trust filed with the deposition of John W. Noble as an exhibit, and here made part of this abstract of the evidence relied upon by the said Newman, and he also offers and proposes to read the trustee's deed by Moses Chapman to H. L. Newman, if the court deems the same material to the issues in the case.

Said intervener also proposes to offer in evidence the re-
44 cord of proceedings had & done by said receiver in procuring the order for adjustment of the claims of persons against the said L., L. & G. R. R. Co., and which said proceedings — among the records of said case & cannot well be ab-reviated.

Said intervener also proposes and asks to offer in evidence in his behalf the report of the sale of said property of said Linneus Branch by Harry Lacy, the special master authorized to make said sale, and also the deed of the said special master, as the same appears among the records of proceedings in said cause and in the said premises; also the order confirming said sale & conditions thereof.

Said intervener also proposes to read in evidence the agreement made & entered into the 12 day of March, 1880, by & between said Elijah Smith, receiver, & and said Henry L. Newman, trustee, &c., and attached to the depositions of said Noble & filed in this cause.

Said intervener also proposes to read as material the deed executed by H. L. Newman & wife & Jno. W. Waddell & wife to said Smith, receiver, under the terms of contract as last aforesaid, and which said deed is filed with the deposition of said Noble, and to which reference is here had and made as part of this abstract of evidence.

45 Said Newman, as such intervener, also proposes to offer in evidence the note and deed of trust identified in said deposition of said Noble as papers placed in the hands of said Noble by the said Newman pursuant to said contract, & which said deed of trust & note are attached to the deposition of said Noble and made part of this abstract.

Intervener also proposes to read on the trial of this cause the entire deposition of John W. Noble taken in this cause on the 18th day of November, 1881, & filed in this behalf, which cannot be made more concise than the original.

Intervener also will propose to read in evidence on the trial of this cause the answers of P. Henry Smith in his depositions filed herein to interrogatories numbered, respectively, four, five, nine, ten, twelve, thirteen, fourteen, fifteen, sixteen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, & thirty, & which cannot be well shortened or made more concise by an abstract thereof.

Said H. L. Newman, intervener, also proposes to offer as
46 evidence in his behalf that portion of the deposition of Tilton Davis, agreed to be used in this cause, which recites as follows:

"That some time in Dec., 1879, Elijah Smith came to my office in the city of St. Louis, &, as receiver of the B. & S. W. Co., expressed a desire to enter upon negotiations looking to the settlement of outstanding claims against the said L., L. & G. R. R. Co. and representing that he, as such receiver, would settle such outstanding indebtedness and was ready & prepared to commence & complete said leased property of said road south of the river, as contemplated & agreed upon in said lease, & proposed, among other things, to settle & adjust a claim dated M'ch 3, '73, for $5,666.00, due me one year after date—10 per cent. from date—& held & owned by myself & against said L., L & G. R. R. Co. & constituting a part of the indebtedness refer-ed to in said contract and paper filed with deposition of said Davis—Ex. B. He proposed a settlement of all matters between ourselves, &, as a compromise of said note so held by me, to give me a contract, as receiver, for the sum of $5,000. I said to said Smith that I doubted his authority to act without the authority of the court. He represented that he was about starting pro-
47 *proceedings* authorizing him generally to settle claims, particularly the claim of H. L. Newman, & that if I would accept the terms proposed he would have the order so made as to adjust & paying claims; but he has not paid said note, but still keeps it & refuses to comply with his agreement. Said witness further says that he is familiar with the said property leased, "& that at the date of the mortgage placed thereon by B. & S. W. that said portion of said road south of the river constituted the most important portion of said line & the bulk of security for said mortgage. Subsequent to the execution of said mortgage said portion of said road north of the river, between Unionville & Laclede, of a distance of about 50 miles, was ironed by means of bonds placed in gross and entirety upon

said Linneus Branch line, including said leased premises, said portion of said roads between the two places last named north of the river being mostly graded by means of county & township bonds, and of the $1,600,000 placed upon said property in gross & disposed of by said company & owned & represented by the persons & bondholders who petitioned said court for said order to settle &
48 adjust said outstanding claims as aforesaid.

I should think when said road was completed & ironed between said towns of Unionville & Laclede it would represent of said bonds of $1,600,000 not exceeding $1,000,000, & the remainder, or $600,000, of said bonds would be represented & secured by said portion of said Linneus Branch south of the Missouri river, & being the portion mentioned in said contract as subject to the payment of the debts therein indicated.

At the date of said contract, of course, said property south of the river had deteriorated materially in value by reason of rains, neglect to keep same up, decay of bridges & ties, & would represent as an integral part of said road, if carried out & finished as contemplated in said lease and as indicated in petitions of said receiver to borrow money and issue certificates to complete the same & pay said outstanding —, one-tenth of the whole amount of bonds issued & disposed of on said entire line; at any rate, assuming said bonds to be of less value then their face as a railroad investment & with parties desiring to engage in building of railroads, it would be worth at said date of said contract seventy-five to one hundred thou-
49 sand dollars, and parties other than the B. & S. W. Co., proposing to iron the same a short time prior to the consummation of said contract, proposed & were willing to give $50,000 therefor, but which negotiations were interfered with by said Smith & broken off by reason thereof.

I am unable by reason of the surroundings and circumstances connected with R. R. matters and investments to fix any definite value upon said property at this date. With proper management, in the hands of railroad men, said property could be made very valuable; otherwise, in other hands, it might be worthless.

Said B. & S. W. has neither since the date of said lease nor the said receiver spent one dollar nor done a single lick of work upon said property as it existed when leased. The only thing I understand that has been done since said sale under said foreclosure has been to reorganize said Linneus Branch in its entirety, which said new organization has leased in perpetuity or has sold said Linneus Branch, including said L., L. & G. property, to the C. B. & Q. R.; and that said parties are endeavoring, as far as I can know, to get and own said leased property without the payment of one cent
50 therefor, there never having been paid by said B. & S. W. Co., said receiver, or any other person or corporation one cent for said property or on the debts assumed to be paid, nor has a single agreement or obligation made been complied with or discharged in any respect whatever.

Said Davis, in the cross-examination, also says, in answer to certain interrogatories, I think about 90 miles of graded, bridged, & partly tied road of work were done at the time.

I am unable to fix any value upon it. In the hands of railroad men, capitalists, with connections made with other roads, especially roads giving it a northern & southern outlet, it would be valuable; but in the hands of men with small means & inability to make such arrangements as indicated I would regard it as almost worthless; and at this time, should a severance take place of said Linneus Branch at Lexington, unless arrangements indicated could be made, I would regard it as destructive of the value of the property.

Intervener may also desire to offer other portions of the deposition of said Davis not here specifically set forth, and embraced in an-

51 swer to interrogatories on cross-examination numbered five, six, seven, ten, eleven, twelve, thirteen, twenty-five, & twenty-six.

Said intervener also proposes to offer as evidence, so far as applicable, an instrument of writing filed with the deposition of said Davis, marked Exhibit B & referred to as such in said deposition.

Said intervener also will offer in evidence certified copies of the articles of incorporation of the Chicago, Burlington and Kansas City Railway Company & concerning the property of said Linneus Branch after the sale and reorganization, and also the articles of consolidation of said last-named company with the company organized & control-ing the main line of the B. & S. W. Company after the sale under the foreclosure, and such papers & proceedings as may be deemed pertinent and relating thereto.

Intervener will also offer in evidence interrogatory No. six and answer thereto in the deposition of Elijah Smith, filed in this cause, in the event said deposition is permitted to be offered by the parties answering the interplea of said Newman.

TILTON DAVIS,
Att'y for said H. L. Newman, Tr., &c.

52 And afterward, to wit, at the regular stated April term, 1883, of said court, began and held at the city of Jefferson on Monday, the 16th day of April, A. D. 1883, and on the first day of said term, there was filed in this cause the receiver's abstract of evidence, which said abstract so filed is in the words and figures following, to wit:

Receiver's Abstract of Evidence.

In the Circuit Court of the United States, Eastern Div., West. Dist. Mo.

FARMERS' LOAN & TRUST CO. *vs.* B. & S. W. R. W. Co. *et al.* } Equity. 297.

In the matter of petition of Henry L. Newman.

Abstract of evidence.

The receiver introduced the decree of foreclosure, passed May 19, 1876, on page 418 of "chancery record A" of this court, which shows, among other things—

1. That the mortgage bonds on which the decree was based were dated April 1st, 1872 (p. 420).

2. That said Newman was not a party to that decree nor in any manner implicated therein.

3. That the receiver was required to account to Harry
53 Lacy, master, appointed in said decree, p. 421.

4. That the master was authorized to sell said road and take the bid in bonds of the road for the benefit of the bondholders, p. 422.

5. That the person bidding for the bondholders should convey the property to a corporation to be organized by them for that purpose.

2.

The receiver has taken in due form & filed the deposition of Elijah Smith, showing—

1. That he attended the sale of the Linneus Branch B. & S. W. R. W.

2. That he represented the bondholders and in their interest & behalf purchased said branch road; that his bid was payable in bonds; that all the bonds had been placed in his hands by the bondholders for the trustees, and he — directly authorized to buy the road & pay the bid in bonds for them.

That no money ever came into the hands of the receiver from said sale.

No money was paid to the trustees or master; that no money ever came into the receiver's hands from the L., L. & G.; that it was not taken into account in making the purchase.

That no money ever came from said L., L. & G. from sale,
54 operating, or otherwise.

3. Receiver refers to and introduces the report of Harry Lacy, master, making sale under said decree, from which it appears (see p. 5) that he sold the said branch road for $1,000,000 in Linneus Branch bonds to Elijah Smith, trustee; that said Smith satisfied him that all prior liens ordered to be paid had already been paid, and, therefore, no cash was required on said sale; that there were no funds in receiver's hands to be turned over to the master.

4. The receiver introduced the deposition of said Lacy, showing the same facts and corroborating the evidence of Elijah Smith that the built portion of the road was only considered in fixing value & bid; bid was in bonds exclusively—no money; that no money came into his hands at or after said sale; that none was paid into the hands of the receiver by reason thereof.

5. The receiver will produce a certificate of the clerk of the circuit court of the United States for Iowa showing that certain debentures are paid off.

6. The receiver will ask to refer to any unread portion of
55 any depositions used by the intervener.

6. The receiver will ask to refer more in detail, if necessary, to the proceedings & orders of this court in this cause.

The receiver does not admit the correctness of interveners' abstract.

The trustees when impleaded will use the same evidence above referred.

P. HENRY SMYTH.
Solicitor for the Receiver & Trustees.

And afterward, to wit, at the said regular stated April term, 1883, of this court, begun and held as aforesaid, the following further proceedings were had in the above-entitled cause on Wednesday, the 25th day of April, 1883, an adjourned day of said term, to wit:

Hearing.

FARMERS' LOAN & TRUST COMPANY
vs.
BURLINGTON & SOUTHWESTERN RAILWAY CO. *et al.* } 297.

In the matter of the intervening petition of Henry L. Newman.

This day comes the receiver herein, by his solicitor, P. Henry Smyth, Esqr., and the intervener, by his solicitors, Messrs. John
56 Noble and Tilton Davis, and this cause being regularly called for trial, and both parties being ready, argument was heard in part, and, not being concluded at the hour of adjournment, it is ordered that the further hearing of this cause be continued until to-morrow morning.

And afterward, at the said regular stated April term, 1883, of said court, begun and held as aforesaid, the following further proceedings were had in the above-entitled cause on Thursday, the 26th day of April, 1883, an adjourned day of said term, to wit:

Further Hearing and Submission.

FARMERS' LOAN & TRUST COMPANY
vs.
BURLINGTON & SOUTHWESTERN RAILWAY CO. *et al.* } 297.

In the matter of the intervening petition of Henry L. Newman.

This day come the parties, by their solicitors, as on yesterday. Thereupon this cause was further argued by counsel and submitted on the pleadings, stipulations, and proofs, and by the court taken under advisement.

And afterward, to wit, at the regular stated April term, A. D.
57 1884, of this court, begun and held at the court-house in the city of Jefferson, Missouri, on the third Monday in April, 1884, the following further proceedings were had in the above-entitled cause on Tuesday, the 29th day of April, 1884, an adjourned day of said term, to wit:

Submission Set Aside and Cause Further Argued and Submitted.

FARMERS' LOAN & TRUST CO.
vs.
BURLINGTON & SOUTHWESTERN R'Y CO. *et al.* } 297.

In the matter of the interplea of Henry L. Newman.

This day come the parties, by their respective solicitors, the intervener by Messrs. John Noble and Tilton Davis, and the receiver by P. Henry Smyth, Esqr., and this cause having been submitted to the court at a former term, viz., the April term, 1883, it is, upon motion, ordered that said submission be, and the same is hereby, set aside.

Thereupon this cause was reargued by counsel and submitted, and, by the court, taken under advisement.

And afterwards, in vacation of said court and on the 10th day of December, A. D. 1884, the opinion of Brewer, circuit judge, was filed in the above-entitled cause, which said opinion is in the words and figures following, to wit:

58 *Opinion. Statement of the Case.*

In the Circuit Court of the United States for the Eastern Division of the Western District of Missouri.

FARMERS' LOAN AND TRUST CO. OF NEW YORK

vs.

THE BURLINGTON AND SOUTHWESTERN RAILWAY CO. *et al.*

Statement on interplea of H. L. Newman *et al.*

The following are the principal facts:

Prior to 1872 the Lexington, Lake and Gulf Railroad Company, a corporation organized under the laws of the State of Missouri for the purpose of building a railroad from the city of Lexington southward, had expended large sums of money in grading and tieing a portion of its road, and upon such road was an existing lien of something over $10,000.00, evidenced by a note and trust deed, and given for liabilities incurred in its construction. In that year it leased its road in an incomplete condition to the Burlington and Southwestern Railway Company. The latter united this leased road with that portion of its own road running northward from
59 Lexington to Unionville, making it one property and line of road, with one common stock and one franchise and known as "The Linneus Branch of the Burlington and Southwestern Railway Company." Upon this Linneus Branch in its entirety was placed a mortgage of $1,600,000.00. By the terms of a contract entered into between the parties about a year after the lease, as well as after the execution of said mortgage, the lessee agreed to pay the liabilities of the lessor to the extent of $20,000.00, which included, as admitted, the debt above described.

That debt became by transfer the property of the interveners. In 1877 certain proceedings were had by which, as it is claimed, this trust deed was foreclosed and the legal title to the road upon which it had been given, to wit, the road south of Lexington, vested in the interveners. In the meantime, default having been made in the payment of the coupons on the $1,600,000 of bonds, a suit had been commenced in this court to foreclose the mortgage. The interveners were not made parties to that suit. A receiver was appointed, who took charge of the whole line, and in April,
60 1876, a decree of foreclosure was entered, but no sale was made until 1880, the road in the meantime being operated by the receiver. In 1879 the interveners, claiming to own that portion of the road south of Lexington, entered into negotiations with one Brown for the sale of it to him for $50,000.00; whereupon the receiver obtained from this court an injunction restraining the parties from interfering with his possession, which injunction broke up the negotiations. Thereafter the receiver entered into negotiations with the interveners for the purchase of their claim and interest. Before these negotiations were consummated the receiver applied to the court for authority to issue receiver's certificates to an amount not exceeding $500,000.00 for the purpose of completing the road south of Lexington, and at the same time and by the same petition applied for authority as follows:

"Your petitioner also asks for authority to settle and adjust, by payment or purchase, any claims against said Lexington, Lake and Gulf Railway Company which may seem to be prior or adverse to the claims of the Burlington and Southwestern Railway Company
61 under the contract by which said Lexington, Lake and Gulf property was acquired."

Upon this petition the receiver obtained authority to issue such certificates, and also the following authority in reference to the purchase of claims:

"And the said receiver is further authorized and directed to settle and adjust, by payment or otherwise, any outstanding claims against the Lexington, Lake and Gulf Railway Company under the contract before mentioned, and to purchase in any outstanding or adverse lien or title to any portion or all of said property, and any right or title so acquired to be conveyed to him as receiver for the benefit of the parties in interest herein."

The authority to issue receiver's certificates provided that those certificates should be a first and specific lien only upon that part of the road south of Lexington. In fact, no receiver's certificates were issued and nothing done toward the completion of that part of the road; but in March, 1880, a contract was made between the receiver and the interveners by which the latter sold their claim and interest for $17,750. That contract provided for payment by the receiver out of the money coming into his hands from that part of the
62 road south of Lexington or from the sale of receiver's certificates which had been previously authorized as above stated, or from any earnings of that portion of the road or arising from the sale thereof under the decree theretofore entered. On the 30th of

November, 1880, the road, as a whole, and without any separate appraisement of the two parts south and north of Lexington, was sold for a million of dollars, payment of which sum was made in mortgaged bonds as authorized by the terms of the decree. On July 5th, 1881, this sale was confirmed with a reservation of power to make any further orders, decrees, and directions in respect to the property, and with regard to any claim, right, interest in or lien upon it; and now, the claim of the interveners not having been paid as adjusted by the terms of said contract, they insist that unless it be paid within some reasonable time the order of confirmation should be wholly set aside and possession of the entire road again taken by the court. On the other hand, while it is conceded by the receiver and the purchasers at the sale that the interveners have a prior lien upon that part of the road lying south of Lexington, they insist that the only order should be one fixing the amount of such
63 lien and decreeing a sale of that portion of the road for its satisfaction.

Opinion of the Court.

BREWER, *Circuit Judge:*

The question is as to the duty of a court in respect to contracts made by its receiver under its directions. The theory of the one side seems to be that the issue of receiver's certificates or the execution of other similar obligations simply gives to the holder a lien which he may enforce in any of the ordinary methods of judicial foreclosure. He is not a party, must intervene if he wishes to insist on payment, and intervening occupies the position of any other lienholder. He has advantages in that his priorities are judicially declared in advance, but beyond that nothing. Thus it is conceded that the interveners are now in court; that they have a prior lien on the road south of Lexington, and that the court may adjudicate its amount and order a sale therefor; but all that any lienholder may acquire. The interveners might have done this before their contract with the receiver. Did that profit them nothing? On the other hand it is insisted that it is the duty of the court to see
64 that contracts made by its orders are performed; that it ought not to remit the holder of such a contract to the ordinary remedies of lien or debt holders, but on the mere suggestion of omission or failure itself take measures to secure performance, and such measures as will most certainly and promptly secure it.

In other words, it owes to the holders of its contracts not the duty merely of providing a forum in which such holders may enforce performance; it owes performance. To that end it should continue its receivers in office and retain possession of the property until every contract has been fully performed; and if purchasers of the property fail to discharge all the obligations it has placed upon such property it should not let the purchase stand. The condition of a final and absolute confirmation is the satisfaction of all such obligations. Here a sale has been conditionally confirmed. An obligation cast by the receiver under orders of the court remains unpaid. The

confirmation should not be made absolute or the property passed from the control of the court with that obligation outstanding. I agree with the last-named views. The court should be chary of promise,
but eager of performance; careful not to burden property
65 in its possession with obligations and equally careful to see
that every obligation is discharged before that possession is finally surrendered. It owes performance and should assume all its burdens and not turn the holder of its contracts off with simply the assurance that he has a valid lien which he may foreclose. The confirmation which was entered was only conditional and with a reservation such as gives the court still full control. Burnham *vs.* Bowen, 111 U. S., 776. Doubtless the court might prior to the sale have modified the decree so as to provide for separate sale of the two parts of the road lying, respectively, north and south of Lexington; in which case even if the rights of the interveners had not been protected by the purchasers only the sale of the latter part need have been disturbed; but the sale was made of the road as a whole, and there is nothing before me to justify an apportionment of the proceeds.

Counsel for the receiver and purchasers says that the road south of Lexington has ceased to be of any value and that to set aside the sale of the whole, unless this debt, chargeable only upon a valueless
part, is paid, would simply be covering the purchasers and
66 owners of valuable property to pay for other property which
they do not want. Assuming it to be valueless, although it is in evidence that $600,000 was expended in work upon it, and still there are strong equities why the interveners should not be remitted to a foreclosure of their lien and some equities in favor of charging their debt upon the entire road.

This now claimed valueless part was valuable enough to be included in the mortgage, the decree, and the sale.

When negotiations were pending for a sale by the interveners the receiver representing the entire properties deemed it of sufficient value to interfere by injunction, break up the negotiations, and prevent the interveners from realizing on their claim. Subsequently he deemed it of sufficient value to apply for and obtain authority to borrow $500,000 on receiver's certificates to complete the road and further authority to purchase the claims of interveners. After thus baffling and delaying them it may not be inequitable to hold that the road as a whole should bear the burdens and losses of delay; but it is unnecessary now to determine absolutely the rights of the
parties. It is enough to hold that the sale of the property as
67 a whole should not stand with this receiver's obligation on a
part unsatisfied. The order will therefore be that the order of confirmation and the sale be set aside and the receiver directed to take possession of the property unless within ninety days the claim of the interveners be paid. If it be paid the order of confirmation will be final.

And afterwards, to wit, in vacation of said court and on Friday, the 9th day of January, A. D. 1885, the following further entry appears of record in the above-entitled cause, to wit:

This day the following decree was filed in this case, to wit:

Decree.

In the Circuit Court of the United States for the Eastern Division of the Western District of Missouri. In Equity.

FARMERS' LOAN AND TRUST COMPANY, Complainant,
vs.
THE BURLINGTON & SOUTHWESTERN RAILWAY COMPANY *et al.*, Defendants—Henry L. Newman, Trustee, *et al.*, Interveners. } No. 297.

NOVEMBER 28TH, 1884.

68 This cause having been heretofore heard on the intervention of Henry L. Newman, trustee for himself and John W. Waddell, with all the pleadings and exhibits, proofs, records, and evidence introduced by the parties, no parol evidence having been introduced by either party, and having been fully argued by counsel and taken under advisement by the court, upon full consideration thereof it is now ordered, adjudged, and decreed that there is justly due the intervener named the sum of seventeen thousand seven hundred & fifty dollars, with interest thereon from the 30th day of November, A. D. 1880, at the rate of six per centum per annum until paid, and that said claim to amount aforesaid was authorized by this court to be incurred by its receiver in this cause and was by him so incurred, and was to have been provided for and paid out of the proceeds of sale of that railroad and property described in the mortgage made to complainants by the defendant, The Burlington & Southwestern Railway Company, and which was sold on the 30th day of November, 1880, by order of this court, and the sale whereof was conditionally confirmed on July 5th, 1881; that said claim not having been paid or provided for, said sale of said rail-
69 road & property sold as aforesaid, as well as the confirmation thereof, is hereby set aside and for naught held, and said receiver of this court in this cause is hereby ordered to take exclusive possession of said railroad & property, with any additions or appurtenances thereto absolutely necessary to regain his original possession of all said property in all things the same and with all the powers in him as said receiver heretofore vested, at and upon the expiration of ninety (90) days from the date of this decree unless within said last-named period of ninety days the claim of said intervener in the sum hereinbefore determined be paid with interest and the costs of this proceeding to said H. L. Newman, trustee as aforesaid, by said Elijah Smith, as trustee for bondholders, purchaser at said sale, and if said claim be paid as aforesaid, then said sale shall stand and said order of confirmation be final as to said demand.

And the said Farmers' Loan & Trust Company, complainants, and Elijah Smith, receiver and trustee, purchaser at the foreclosure sale, excepting to said decree, pray an appeal therefrom in open

court, which is allowed, and said appeal shall operate as a
70 supersideas of this decree upon condition that said complainants and said Elijah Smith file a bond, to be approved by this court or one of the justices thereof, in the sum of ten thousand dollars, conditioned as the law directs.

And this decree is signed and ordered to be entered as of the 28th day of November, 1884.

Signed Jan'y 8, 1885.

DAVID J. BREWER, *Circuit Judge.*

And afterwards, in vacation of said court and on Monday, the 26th day of January, A. D. 1885, the following further entry appears of record in the above-entitled cause, to wit:

Appeal Bond Filed.

FARMERS' LOAN & TRUST CO.
vs.
BURLINGTON & SOUTHWESTERN R'Y CO. *et al.* } 297.

In the matter of the intervening petition of H. L. Newman.

This day there is received and filed herein an appeal bond in the sum of ten thousand dollars, and endorsed thereon is the following:

"The above bond approved this Jan'y 24th, 1885.
(Signed) DAVID J. BREWER, *Circuit Judge.*"

71 And the appeal bond so filed as aforesaid is in the words and figures following, to wit:

Appeal Bond.

In the Supreme Court of the United States.

THE FARMERS' LOAN & TRUST COMPANY & ELIJAH SMITH, Receiver & Trustee, Appellants,
vs.
HENRY L. NEWMAN, Trustee & Intervener, Appellee.

Know all men by these presents that we, the Farmers' Loan & Trust Company, Elijah Smith, Chas. E. Perkins, Lyman Cook, Geo. H. Nettleton, are held and firmly bound unto Henry L. Newman, trustee and intervener, in the full and just sum of ten thousand dollars ($10,000), to be paid to the said Henry L. Newman, trustee & intervener, his certain attorneys, executors, administrators, or assigns; to which payment we bind our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of January,
72 in the year of our Lord one thousand eight hundred & eighty-five.

Whereas in a suit in equity depending in the circuit court of the United States for the eastern division of the western district of Mis-

souri, wherein The Farmers' Loan and Trust Company was complainant and the Burlington and Southwestern Railway Company and others were defendants, and wherein Henry L. Newman, trustee, was intervener, a decree was passed and rendered in favor of the said Henry L. Newman, trustee, upon his intervening petition, and against said complainant, The Farmers' Loan and Trust Company, and Elijah Smith, receiver & trustee; and the said complainants and said Elijah Smith having appealed from said decree to the Supreme Court of the United States for a reversal thereof:

Now, the condition of the above obligation is such that if the said complainant, The Farmers' Loan and Trust Company, and said Elijah Smith, appellants, shall prosecute their said appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

73 THE FARMERS' LOAN & TRUST COMPANY, [SEAL.]
By R. G. ROLSTON, *President.* [SEAL.]
ELIJAH SMITH. [SEAL.]
CHAS. E. PERKINS,
By J. W. BLYTHE,
His Att'y-in-Fact. [SEAL.]
LYMAN COOK. [SEAL.]
GEO. H. NETTLETON. [SEAL.]

The above bond approved this Jan'y 24th, 1885.
DAVID J. BREWER,
Circuit Judge.

And to said bond there is attached a power of attorney in the words and figures following, to wit:

CHICAGO, BURLINGTON & QUINCY
RAILROAD CO., PRESIDENT'S OFFICE,
BURLINGTON, IA., *Jan.* 18, 1885.

I hereby authorize J. W. Blythe to sign for me as my attorney-in-fact supersideas bond in case Farmers' Loan and Trust Company *vs.* Burlington and Southwestern Railway Company, Henry L. Newman, intervener, west dist. of Missouri.

CHARLES E. PERKINS.

74 *Lease of Feb.* 7, 1872, *L. L. & G. R. R. to B. & S. W. R'y Co.*

Intervener's evidence.

Lease of February 7th, 1872, attached to deposition of Tilton Davis

Art. 2nd. The said party of the second part, for itself, its successors and assigns, in the name of and for and in behalf of said Linneus Branch, covenants and agrees with said party of the first part, its successors and assigns, that it, the said party of the second part as aforesaid, will, within two years from the first day of Janu-

ary, eighteen hundred and seventy-two, cause to be constructed and have ready for operation said Linneus Branch from said town of Unionville as aforesaid to the Missouri river opposite said city of Lexington.

Art. 4. And it is mutually agreed and understood between the parties hereto that said line of railroad hereby leased and the said Linneus Branch of said Burlington & Southwestern railway from Unionvilie southwardly as aforesaid shall, for the purposes of said mortgage and trust deeds as aforesaid and for the purpose in this article expressed, be and constitute, to all intents and purposes, one line of road and one common property, and for that purpose
75 shall be known and designated as the Linneus Branch of the Burlington & Southwestern railway until said name shall be legally changed.

That all stock heretofore issued by said first party and all that it may issue hereafter in pursuance of this agreement, and all the stock heretofore or hereafter to be issued to aid in the construction and in the name of said Linneus Branch shall be placed upon the same footing, and in sharing in the net earnings of said line of roads be considered as one common stock, and in all respects the shareholders in said first party and said branch, whether corporations, individuals, or otherwise, shall be entitled to share *pro rata* in any dividends of net earnings arising out of said continuous line of branch railroad according to the number of shares held, respectively, and indicated by the respective certificates held by such shareholders in each, except as may hereinafter be provided.

75*a* Art. 5. And the said party of the second part, in the name of and for such branch, agrees & covenants that it, the said party of the second part, will commence the laying of iron on said road hereby leased at Lexington within five months from the first day of February, A. D. eighteen hundred and seventy-two, and to prosecute said work in good faith and to complete the same and run its cars to the said city of Butler as soon as practicable after the means necessary thereto can be realized by the sale of said first-mortgage bonds or otherwise, and that it, said party of the second part as aforesaid, further agrees that the iron and material used in completing said demised premises shall be of good quality, and said road constructed on what is known as the standard *gua*ge, and that it will properly equip and operate said road after its completion as aforesaid, and said second party further agrees that after said leased road is completed as aforesaid, and said Linneus Branch from Unionville to the Missouri river as aforesaid, that said second party will provide and maintain such ferry or transfer boats as may be necessary for the transaction of the business of said line of roads over the Missouri river at the said city of Lexington.

75*b* Art. 11. Said party of the first part hereby covenants and agrees that it is well and truly seized of the premises hereby demised, and that it has full power to convey and lease the same according to the intent and meaning of these presents, and the same in the quiet and peaceable enjoyment of the party of the second part will warrant and by these presents defend; that said road and

property hereby leased is free from all lien, incumbrances, and debts, except about the sum of fifteen thousand dollars due contractors thereon, and that said party of the first part has yet in the counties of Bates and Vernon subscriptions to the amount of one hundred & thirty-two thousand dollars in money and bonds, and out of which said party of the first part agrees said sum of fifteen thousand dollars shall be paid, and that it owns or will acquire by said subscriptions the free right of way the entire length of said line of road between the cities of Lexington and Butler aforesaid, and that said road-bed is graded and bridged except about one mile in the south part of Lafayette county, and all of said road ex-
75c cept about forty miles is ready for the iron. Said party of the first part further agrees that it will turn over to said party of the second part to use, or it, the party of the first part, will use all unpaid subscriptions which can be made available in completing said road ready for the iron between said cities of Lexington and Butler after paying the incumbrances aforesaid, and will aid in procuring new subscriptions for that purpose.

That there has only been issued by said first party about ($575,000) five hundred and seventy-five thousand dollars of its capital stock, and only about that amount has been subscribed, except by the counties of Bates & Vernon, for sundry townships in the sum of one hundred and thirty-two thousand dollars ($132,000), which has been subscribed but not yet paid to the party of the first part, stock for which is to be issued when subscriptions are paid; that said first party have done all acts necessary to be done to preserve the
75d corporate privileges and franchises under the laws of Missou

Articles of Consolidation of L., L. & G. R. R. with B. & S. W. R'y Co., Dated May 16, '73.

Articles of consolidation of May 16th, 1873. Exhibit "B," attached to deposition of Tilton Davis.

This indenture, made and entered into this sixteenth day of May, A. D. 1873, by and between the Lexington, Lake and Gulf Rail-
road Company, a corporation existing under the laws of the
76 State of Missouri, party of the first part, and the Burlington and Southwestern Railway Company, a corporation organized and existing under the laws of the States of Iowa and Missouri, party of the second part, witnesseth:

That whereas the said party of the second part is duly organized and authorized by the laws of the States of Missouri and Iowa to construct and operate a railroad in said States, and now has the same completed and in operation to or near the town of Unionville, in said State of Missouri;

And whereas the said second party is desirous of extending their line of road in said State of Missouri beyond said town of Unionville to the city of Lexington, in Lafayette county, Missouri, and thence southward from said city of Lexington, by the way of Pleasant Hill, in Cass county, and Butler, in Bates county, Missouri, to some suita-

ble point on the line of the Atlantic and Pacific railroad in the State of Missouri or the Indian Territory, and to build and operate their said railway upon said line;

And whereas the said party of the first part, a company duly existing under the laws of Missouri, have purchased and now own what was heretofore known as the "Linneus Branch of the
77 Burlington and Southwestern railway," embracing all properties, rights, and franchises of said branch, and which said branch connects with and intersects said Burlington and Southwestern Railway Company at or near said town of Unionville and extends and is partly built, constructed, and being operated from said town of Unionville, by way of Linneus, in Linn county, through Carroll county, to Lexington, in Lafayette county, and thence to Kansas City, and to such other points in Southwestern Missouri as may be determined upon;

And whereas said first party under its charter and articles of incorporation is authorized by the laws of Missouri to construct and operate a railroad from said city of Lexington to the south boundary line of said State of Missouri, and of which said last-mentioned Lexington, Lake and Gulf railroad about one hundred miles have been graded and bridged and forty miles thereof tied and ready for the iron, and extending from said city of Lexington to near the south boundary line of Bates county, together with the grading now completed and in course of completion under contract in Vernon county, Missouri;

And whereas the line of road of said Lexington, Lake and
78 Gulf Railroad Company, including the extension thereof made by said branch line so purchased and owned as aforesaid, connects with the line of said Burlington and Southwestern railway at or near the said town of Unionville;

And whereas said Burlington and Southwestern Railway Company is desirous of extending its said road beyond said town of Unionville southwardly along and over the line of said first party as aforesaid to said Atlantic and Pacific railroad, and also to Kansas City on the south side of the Missouri river from said city of Lexington, and is desirous of purchasing and acquiring the property, rights, and franchise owned and held by said Lexington, Lake and Gulf Railroad Company;

And whereas it is to the interest of all concerned that said road should be built as early as possible and be under one management, and be owned and controlled by one company and constitute one line of road:

Now, therefore, know all men by these presents that in consideration of the premises and the sum of one dollar in hand paid (the receipt of which is hereby acknowledged), as well as the covenants, stipulations, and agreements hereinafter set forth on the part
79 of said second party, its successors and assigns, to be kept and performed, together with the amount of indebtedness to be paid and assumed as hereinafter mentioned, the said Lexington, Lake and Gulf Railroad Company, in pursuance of the authority of the board of directors of said company and of the written consent of

the stockholders thereof, as required by law, do hereby give, grant, bargain, sell, convey, and confirm unto the said Burlington and Southwestern Railway Company, its successors and assigns, forever all and singular the said road and other property of said Lexington, Lake and Gulf Railroad Company situated and being in the State of Missouri, including said branch line, purchased as aforesaid, and extending as aforesaid from Unionville to Lexington and the points hereinbefore referred to, embracing and covering all property, rights of way, depot grounds, ties, road-bed, bridges, culverts, water tanks, iron, track, rolling stock, and appurtenances now owned, acquired, and to be acquired by said party of the first part, together with all the rights, franchises, immunities, privileges, powers, and authority owned or held by said Lexington, Lake and Gulf Railroad Company under and by virtue of its said charter and act of incor-
80 poration, together with all the rights, powers, and franchises acquired by said party of the first part under and by virtue of said purchase and ownership of said Linneus Branch, with the right to survey, locate, build, and operate the said road between said town of Unionville and the termini aforesaid, or such other points as may be determined upon, and in so doing to be entitled to the same privileges, rights, and franchises and immunities to which the said first party is or would be entitled under like circumstances; and the said first party hereby sells, transfers, and assigns unto said second party all subscriptions of stock of every kind to which said first party is entitled, or which has been or hereafter may be subscribed to the capital stock of said first party, with the right to receive, hold, and use the same in the construction of said road in the manner and to the same extent as said first party is or may be authorized to do, hereby intending to substitute the said second party to every right of property and to all privileges, rights, franchises, and immunities in the State of Missouri to which said first party is or may be entitled, either in law or equity, or to which it would have been entitled if it had constructed and operated said railroad hereby sold and intended to be relinquished to the
81 said second party for the purpose and with the view and in consideration of the premises aforesaid upon the terms and conditions hereinafter set forth, to wit:

Article 1st. That said party of the second part, its successors or assigns, covenants and agrees with said party of the first part that it, said party of the second part, will, on or before the first day of July, A. D. 1874, or as soon thereafter as practicable, considering the magnitude of the work, and so soon as practicable after the money can be realized for that purpose by the sale of the first-mortgage bonds upon said road, cause to be constructed and have ready for operation said part of said line of road extending from said town of Unionville as aforesaid to the Missouri river opposite said city of Lexington; and, further, that the work of laying the iron, now progressing southward from said river on the original line of said Lexington, Lake and Gulf railroad, shall continue, and said ironing and work of completing said part of said road last-mentioned progress, and that it, said party of the second part, will con-

tinue to prosecute said work as last aforesaid in good faith and complete the same and run its cars to the town of Butler and
82 the southern terminus of said contemplated line of road as soon as practicable after and as the means necessary thereto can be realized by the sale of the mortgage bonds placed upon said road of said second party or otherwise, and that it, said second party, also agrees that the iron and material used thereon shall be of good quality and its track of same gauge as now adopted by said second party; said second party also agrees that when said road shall have been completed from the said town of Unionville to the Missouri river as aforesaid, and within a reasonable time thereafter, that it, said second party, will provide or cause to be provided and maintained such car-transfer boat as may be necessary for the transaction of business in crossing said Missouri river at said city of Lexington; and also said second party, for itself, its successors and assigns, covenants and agrees that said line of road shall cross said Missouri river at said city of Lexington, and, when and as soon as completed southward therefrom, the same shall be maintained and operated as part and parcel of the line of said Burlington and Southwestern railway from the city of Burlington to said southern termini in southwest Missouri or in Kansas, as may be determined upon.

83 Article II. And it is mutually agreed and understood between the parties hereto that all stock heretofore subscribed and which has been or shall be hereafter subscribed, and which has been or shall be paid for, or which has been legally issued, or which said first party is obliged to issue, shall be placed upon the same basis and footing with the stock of said Burlington and Southwestern Railway Company, and to that end said party of the second part agrees to take up, on presentation thereof for that purpose, all outstanding certificates of stock issued by said first party and to issue in lieu thereof to the parties entitled thereto and to those parties entitled to stock to whom stock has not yet been issued like amounts of stock of said Burlington and Southwestern Railway Company: Provided, however, The same shall not exceed the number of twenty thousand shares of one hundred dollars each and representing the capital stock of said party of the first part, as authorized by its charter.

Article III. That said party of the second part further agrees that it will keep and carry out all contracts made by said first party in relation to the location of depots; also establish an office at
84 the city of Lexington within a reasonable time after the completion of said line of road thereto, and also that all proceedings of the board of directors of said party of the first part, as well as the original companies out of which said first party was organized and formed, heretofore had and done relative to the discharge and release of the original subscribers of stock thereto shall be observed and binding; and said proceedings shall be valid and binding as against all claims and defenses of said second party as against the said original subscribers of stock and the directors, officers, and agents of said companies; and also that it, said party of the second

part, will at all times hereafter indemnify and save harmless the said party of the first part, its directors, officers, and agents, from all claims for damages growing out of said construction of said road of said first party, and that it, said second party, hereby binds itself and agrees with said first party, its directors, officers, and agents, and each of them, that it will pay off and discharge all damages and amounts necessarily paid by them or either of them (if anything) which may be assessed and paid after this sale and purchase shall go into effect, and also that said second party hereby assumes
85 and agrees to pay the present outstanding indebtedness of said first party, and which does not exceed the sum of twenty thousand dollars ($20,000) and of which said second party agrees to pay one-third (⅓) thereof within one year from this date and the remainder in equal parts within two and three years from said date.

And also said second party hereby agrees and binds itself to assume and pay off all debts and liabilities last aforesaid, and agrees to pay off the same to the extent and in manner set forth in said contract of sale and purchase, and to save said first party harmless in the premises, but the foregoing liabilities last mentioned does not include said sum of twenty thousand dollars before mentioned and agreed to be paid, nor is there any claim now known or pending for unliquidated damages, as before referred to and mentioned, against said officers, agents, or directors.

Article 4. And it is further mutually agreed and understood that said party of the first part shall, in case this instrument shall not be sufficient to invest and clothe the said second party with all powers, rights, privileges, franchises and immunities, claims and interests of property hereinbefore mentioned, and hereby intended to
86 be conveyed, and said objects may be accomplished in any other legal and proper manner, or by any other instrument of writing, said first party will enter into such other articles of agreement, consolidation, conveyance, or other necessary stipulations or writings as said second party may on reasonable notice require and as will be competent to carry out the purposes and intentions of this conveyance upon the considerations and conditions herein expressed, and also that said party of the first part and all and every person or persons, corporation or corporations, lawfully or equitably deriving any title, estate, right, or interest in or to the property and rights herein granted by, from, under, or through or in trust for said first party, shall and will at all times hereafter, and upon reasonable request of said second party, make, do, and execute, or cause to be done and executed, all and every further and other lawful and reasonable acts, things, conveyances, and assurances in law for the better and more effectually vesting and confirming the premises, rights, franchises, — property hereby granted, or so intended to be, in and to the said second party, its successors and assigns.

And it is further expressly agreed and understood that if
87 said second party, its successors or assigns, shall fail to build its said line of road on the lines herein referred to and as herein agreed and stipulated, or if said second party shall abandon

said enterprise, its purposes and objects, in such event — shall reconvey to said party of the first part all the property, rights, and franchises hereby sold, or the same shall, on such failure to reconvey as aforesaid, revert to said first party and entitle said first party to the possession thereof, with all property and franchises in and about the same existing; but it is distinctly agreed and understood that in making this indenture time is and shall not be of the essence of the contract, and that a simple failure to do and perform any part of the work within a specified time shall not work any forfeiture unless it shall be wilful; and so long as said second party acts in good faith and uses all legal and proper means within its power to keep its stipulations and agreements herein set forth it shall not forfeit any rights and properties hereby acquired and to be acquired, nor be under any obligations to reconvey, as herein set forth; but in case said first party shall or should become entitled to such reconveyance under forfeiture
88 as before mentioned, then such reversion or reconveyance shall not affect the interests of the stockholders and others therein to any greater extent than if said property, rights, privileges, and franchises here sold and conveyed had remained and continued under the absolute control and ownership of said second party, its successors and assigns—that is to say, every person, company, or corporation who, at the time of this conveyance, shall be entitled to stock in the Lexington, Lake and Gulf Railroad Company and who, in pursuance hereof, shall become entitled to stock in the said Burlington and Southwestern Railway Company, in case of such reconveyance to said Lexington, Lake and Gulf Railroad Company, shall thereupon be entitled to present their certificates and demands, and have the same amount of the stock of the Lexington, Lake and Gulf Railroad Company's issued to them; and it is distinctly understood that no such reconveyance or reversion to said Lexington, Lake and Gulf Railroad Company shall affect the validity of any mortgage placed upon said property by said second party, nor any rights or liens accrued thereon by virtue of any contracts or agreements made by said second party.

89 And it is also agreed and understood, and the said first party does hereby represent and guarantee, that in addition to the sum of one million one hundred and sixty-seven thousand seven hundred dollars ($1,167,700.00), or eleven thousand six hundred and seventy-seven (11,677) shares of stock heretofore issued and delivered under and pursuant to the terms of the contract and sale of the Linneus Branch of said Burlington and Southwestern Railway Company to said Lexington, Lake and Gulf Railroad Company, as shown in the deed of sale thereof, there has only been voted or subscribed to the capital stock of said first party and to the capital stock of the two several companies forming, by consolidation, the said Lexington, Lake and Gulf Railroad Company, by cities, townships, counties in behalf thereof, and individuals and all other sources whatsoever, about the sum of eight hundred and thirty-two thousand and three hundred dollars ($832,300.00), or about eight thousand three hundred and twenty-three shares of said capital

stock of said first party, and a portion of which is yet unpaid for, and the said first party hereby guarantees that the amount of
90 stock issued and to be issued cannot exceed that sum and number of shares, as last aforesaid, and which said respective amounts of stock going to make up the capital stock of said first party, as authorized by its charter, it is hereby mutually agreed and understood shall stand upon the same basis of the stock of said second party, and the certificates of stock so issued in said Lexington, Lake and Gulf Railroad Company, when properly presented, shall be taken up and cancelled by said second party, and like sums and amounts of stock in lieu thereof be issued in and by said Burlington and Southwestern Railway Company to such person or persons, corporation or corporations, as may be entitled thereto.

In witness whereof the said parties have caused these presents to be signed by their respective presidents and countersigned by their respective secretaries and the seals of said companies to be hereunto affixed on this sixteenth day of May, 1873.

LEXINGTON, LAKE & GULF RAILROAD COMPANY,
By JNO. REID, *Pres't.*

Countersigned:
[L. S.] B. MARSHALL, *Secretary.*

91 Signed, sealed, & delivered in presence of—
TILTON DAVIS.

BURLINGTON & SOUTHWESTERN RAILWAY CO.,
By ELIJAH SMITH, *President.*

Countersigned:
[L. S.] N. P. SUNDERLAND, *Secretary.*

Signed, sealed, & delivered in presence of—
P. W. SMITH.
B. T. HENRY.

STATE OF MASSACHUSETTS, } *ss:*
County of Suffolk, City of Boston, }

Be it known that on this 26th day of August, A. D. 1873, before me, the undersigned, notary public in and for said county and State, appeared Elijah Smith, to me personally known as president of the Burlington & Southwestern Railway Co. at the date of the execution of the foregoing instrument, and to me known to be the real person who executed the foregoing instrument as such president, and who for himself alone acknowledged that he executed and delivered said instrument freely and voluntarily for the uses
92 and purposes therein expressed, and that the same is the free act and deed of said company, as therein set forth, executed in pursuance of the authority of the board of directors of said

Burlington & Southwestern R'y Co., which said acknowledgement is satisfactory evidence of the due execution and delivery of said instrument, and the same is the act and deed of said company.

In witness whereof I have hereunto set my hand and official seal this twenty-sixth day of August, A. D. eighteen hundred and seventy-three.

[L. S.] CHAS. HALL ADAMS,
Notary Public.

STATE OF MISSOURI, } ss:
County of La Fayette, }

Be it known that on this tenth day of September, A. D. 1873, before me, the undersigned, notary public in and for said county and State, appeared John Reid, to me personally known as president of the Lexington, Lake & Gulf Railroad Company, and to me known to be the real person who executed the foregoing instrument as such president, and who for himself alone acknowledged that he executed and delivered said instrument freely and voluntarily
93 for the uses and purposes therein expressed, and that the same is the free act and deed of said company, as therein set forth, executed in pursuance of the authority of the board of directors of the said Lexington, Lake & Gulf Railroad Company, which said acknowledgement is satisfactory evidence of the due execution and delivery of said instrument, and the same is the act and deed of said company.

In testimony whereof I have hereunto set my hand and notarial seal this the tenth day of September, A. D. eighteen hundred and seventy-three.

[L. S.] JNO. E. ARNOLD,
Notary Public.

Mortgage of B. & S. W. R'y (Linneus Branch) to Farmers' L. and T. Co., Dated April 1, 1872.

Mortgage deed of the Burlington & Southwestern Railway Co. (Linneus Branch) to the Farmers' Loan and Trust Co. of New York.

This indenture, made on this first day of April, one thousand eight hundred and seventy-two, between the Burlington and Southwestern Railway Company, a corporation organized, formed, and existing under and by virtue of the laws of the States of Iowa and Missouri and successor of the Saint Joseph and Iowa Rail-
94 road Company, a corporation duly organized and existing under the laws of the State of Missouri, party of the first part, and the Farmers' Loan and Trust Company of the city of New York, party of the second part, witnesseth:

That whereas the branch railroad hereinafter mentioned was duly projected and established on the twenty-fifth day of March, eighteen hundred and seventy-one, by the said Saint Joseph and Iowa Railroad Company as the Central North Missouri Branch of the Saint Joseph and Iowa Railroad Company, and thereafter said Saint Joseph and Iowa Railroad Company sold and conveyed all their property,

stock of said first party, and a portion of which is yet unpaid for, and the said first party hereby guarantees that the amount of
90 stock issued and to be issued cannot exceed that sum and number of shares, as last aforesaid, and which said respective amounts of stock going to make up the capital stock of said first party, as authorized by its charter, it is hereby mutually agreed and understood shall stand upon the same basis of the stock of said second party, and the certificates of stock so issued in said Lexington, Lake and Gulf Railroad Company, when properly presented, shall be taken up and cancelled by said second party, and like sums and amounts of stock in lieu thereof be issued in and by said Burlington and Southwestern Railway Company to such person or persons, corporation or corporations, as may be entitled thereto.

In witness whereof the said parties have caused these presents to be signed by their respective presidents and countersigned by their respective secretaries and the seals of said companies to be hereunto affixed on this sixteenth day of May, 1873.

LEXINGTON, LAKE & GULF RAILROAD COMPANY,
By JNO. REID, *Pres't.*

Countersigned:
[L. S.] B. MARSHALL, *Secretary.*

91 Signed, sealed, & delivered in presence of—
TILTON DAVIS.

BURLINGTON & SOUTHWESTERN RAILWAY CO.,
By ELIJAH SMITH, *President.*

Countersigned:
[L. S.] N. P. SUNDERLAND, *Secretary.*

Signed, sealed, & delivered in presence of—
P. W. SMITH.
B. T. HENRY.

STATE OF MASSACHUSETTS, } *ss:*
County of Suffolk, City of Boston, }

Be it known that on this 26th day of August, A. D. 1873, before me, the undersigned, notary public in and for said county and State, appeared Elijah Smith, to me personally known as president of the Burlington & Southwestern Railway Co. at the date of the execution of the foregoing instrument, and to me known to be the real person who executed the foregoing instrument as such president, and who for himself alone acknowledged that he executed and delivered said instrument freely and voluntarily for the uses
92 and purposes therein expressed, and that the same is the free act and deed of said company, as therein set forth, executed in pursuance of the authority of the board of directors of said

Burlington & Southwestern R'y Co., which said acknowledgement is satisfactory evidence of the due execution and delivery of said instrument, and the same is the act and deed of said company.

In witness whereof I have hereunto set my hand and official seal this twenty-sixth day of August, A. D. eighteen hundred and seventy-three.

[L. S.] CHAS. HALL ADAMS,
Notary Public.

STATE OF MISSOURI, }
County of La Fayette, } *ss:*

Be it known that on this tenth day of September, A. D. 1873, before me, the undersigned, notary public in and for said county and State, appeared John Reid, to me personally known as president of the Lexington, Lake & Gulf Railroad Company, and to me known to be the real person who executed the foregoing instrument as such president, and who for himself alone acknowledged that he executed and delivered said instrument freely and voluntarily
93 for the uses and purposes therein expressed, and that the same is the free act and deed of said company, as therein set forth, executed in pursuance of the authority of the board of directors of the said Lexington, Lake & Gulf Railroad Company, which said acknowledgement is satisfactory evidence of the due execution and delivery of said instrument, and the same is the act and deed of said company.

In testimony whereof I have hereunto set my hand and notarial seal this the tenth day of September, A. D. eighteen hundred and seventy-three.

[L. S.] JNO. E. ARNOLD,
Notary Public.

Mortgage of B. & S. W. R'y (Linneus Branch) to Farmers' L. and T. Co., Dated April 1, 1872.

Mortgage deed of the Burlington & Southwestern Railway Co. (Linneus Branch) to the Farmers' Loan and Trust Co. of New York.

This indenture, made on this first day of April, one thousand eight hundred and seventy-two, between the Burlington and Southwestern Railway Company, a corporation organized, formed, and existing under and by virtue of the laws of the States of Iowa and Missouri and successor of the Saint Joseph and Iowa Rail-
94 road Company, a corporation duly organized and existing under the laws of the State of Missouri, party of the first part, and the Farmers' Loan and Trust Company of the city of New York, party of the second part, witnesseth:

That whereas the branch railroad hereinafter mentioned was duly projected and established on the twenty-fifth day of March, eighteen hundred and seventy-one, by the said Saint Joseph and Iowa Railroad Company as the Central North Missouri Branch of the Saint Joseph and Iowa Railroad Company, and thereafter said Saint Joseph and Iowa Railroad Company sold and conveyed all their property,

rights, privileges, and franchises to the Burlington and Southwestern Railway Company, a corporation existing under the laws of Iowa; and whereas said Burlington and Southwestern Railway Company, by virtue of said purchase and the laws of said State of Missouri, is duly authorized to construct said branch railroad; and whereas the name of said branch road has been duly and legally changed and it is now known as the Linneus Branch of the Burlington and Southwestern Railway Company; and
95 whereas the said first party has leased for the term of one thousand years the railroad and property and franchises of the Lexington, Lake and Gulf railroad, extending from Lexington, Missouri, southwardly, for the use and in behalf of said branch line and as a part of the same, with the right to mortgage the same, as herein set forth;

And whereas the said first party is authorized by the laws aforesaid to borrow any sums of money which may be necessary to construct, equip, and maintain its said branch railroad and to secure the payment thereof by mortgage or deed of trust of its corporated property and franchises which it now has or may hereafter acquire in and connected with the said branch line of road and the leased premises herein referred to;

And whereas the said party of the first part, by a resolution of its board of directors and in pursuance of the instructions and request of the stockholders of the said branch, at a meeting duly called for that purpose, and the consent of the stockholders of the said Lexington, Lake and Gulf railroad, leased as aforesaid and set forth in the deed of lease to said first party, has duly authorized its
96 president and secretary to execute in the name and under the corporate seal of said company, to issue bonds to be designated as the first-mortgage bonds upon the said Linneus Branch and numbered in a regular series from one (1) to the highest number issued, and to be secured by such deed of trust or mortgage on the whole line of said branch railroad extending from Unionville, in Putnam county, Missouri, to Kansas City, by the way of Lexington, and such other point in Southwest Missouri as may hereafter be determined upon, and from Lexington, Missouri, over said leased premises, to Butler, in Bates county, Missouri, and to such other point at or near the Arkansas line as may be hereafter determined upon by the board of directors in such form and upon such conditions as the said president may deem most advantageous to aid in procuring the necessary means to build and equip the said branch railroad, including said leased premises, to any amount not exceeding twenty thousand dollars per mile of the whole line of said branch, it being understood that for the purpose of these presents and as set forth in the deed of lease *that* said Lexington, Lake
97 and Gulf railroad is a part and parcel of said branch line;

And whereas, by said resolution and the consent and authority aforesaid, the said president is authorized to incorporate in said deed of trust or mortgage such terms, conditions, and rate of interest, not exceeding eight per cent. per annum, payable semi-annually, as he might determine;

And whereas said president has determined to make said bonds payable at the agency of said company in the city of New York or in the city of London, England, twenty-five years from the first day of April, in the year one thousand eight hundred and seventy-two, bearing interest at the rate of seven per cent. per annum, payable semi-annually in gold coin, at the agency of said company in New York or London, England, as aforesaid, free of United States Government tax, said bonds to be convertible into the capital stock of the said branch road, at the option of the holder thereof, on any first day of April or October for twenty years from this date, the holder receiving therefore at the rate of ten shares of said capital stock for each one-thousand-dollar bond, and to have said bonds duly
98 prepared and deposited with said parties of the second part, to be delivered over to the treasurer of said railway company upon the order of said president, to be used exclusively in the construction and equipment of said Linneus Branch, as hereinbefore stated, with the necessary sidings, stations, and other appurtenances, said bonds to be of the denomination of one thousand dollars or £200 sterling each, and are in the form following, to wit:

UNITED STATES OF AMERICA, *States of Iowa and Missouri.*

£200 sterling. No. —. $1,000.00.

Burlington and Southwestern Railway Company, Linneus Branch.

Lexington and Kansas City Division first-mortgage sinking-fund convertible bond on the Linneus Branch of said road; seven per cent. gold, free of U. S. Government tax.

Know all men by these presents that the Burlington and Southwestern Railway Company, for and in the name of the Linneus Branch of said railway, which said branch was duly projected and established by the Saint Joseph and Iowa Railroad Company under and by virtue of the laws of the State of Missouri as the Cen-
99 tral North Missouri Branch of said Saint Joseph and Iowa Railroad Company, which said Saint Joseph and Iowa Railroad Company sold its property and franchises to the said Burlington and Southwestern Railway Company, a corporation organized and existing under the laws of the State of Iowa, is indebted unto the Farmers' Loan and Trust Company of the city of New York, or bearer, in the sum of one thousand dollars in United States gold coin at par, to be paid at the agency of the said railway company in the city of New York, or the sum of two hundred pounds sterling, to be paid at the agency of the said railway company in the city of London, England, at the option of the holder hereof, on the first day of April, A. D. one thousand eight hundred and ninety-seven, with interest on the said principal from and after the date hereof, at the rate of seven per cent. per annum, in gold coin, as aforesaid, free of all United States Government tax or duty, at such agency in the city of New York or in the city of London, on the first day of April and October of each

year, on the presentation and surrender of the annexed
100 coupons as they severally become due, in accordance with their provisions.

This bond shall pass by delivery or by transfer on the books of the company kept for that purpose at its agency in New York and such other places as the board of directors may hereafter legally appoint. After a registration of ownership certified hereon by the transfer agent of the said company no transfer, except on the books of the company, shall be valid unless the last transfer shall have been to bearer; the bond to be subject to successive registrations and transfers on bearer at option of any lawful holder.

This bond is one of a series issued by the said Burlington and Southwestern Railway Company by virtue of the provisions of a lease of the Lexington, Lake and Gulf railroad to said first party in the name and for the use of said Linneus Branch and by virtue of the authority of an act of the General Assembly of the State of Missouri entitled "An act to aid in the building of branch railroads in the State of Missouri," approved March twenty-first, eighteen hundred and sixty-eight, and in pursuance of the authority of the
101 stockholders in said branch and to aid in the construction and equipment of the said Linneus Branch of the Burlington and Southwestern railway and said leased premises, extending from the main line of said first party at or near Unionville, in Putnam county, in the State of Missouri, in a southwesterly direction by the way of Linneus, in Linn county, and Lexington, in La Fayette county, to Kansas City, and such other point as may hereafter be legally determined upon, and also upon the line of road leased from the Lexington, Lake and Gulf Railroad of Missouri for the use of said branch, extending from Lexington aforesaid to Butler, in Bates county, and such other point as may hereafter be legally determined upon, limited to twenty thousand dollars of bonds to a mile of road, secured by a first mortgage and trust deed to the said Farmers' Loan and Trust Company of the road, rolling stock, and franchises of the said Linneus Branch and pertaining thereto, including the said leased premises entitled to the benefit of a sinking fund provided for in the mortgage and convertible into the capital stock of the said branch line on any first day of April and October during a period of twenty years from date.

102 This bond is to be valid only when authenticated by a certificate endorsed thereon, signed by the trustee named in the mortgage and bond.

In witness whereof the said company has caused its corporate seal to be hereto affixed and the same to be subscribed by its president and countersigned by its secretary in conformity to said mortgage under date of April 1st, A. D. 1872.

—— ——, *President.*
—— ——, *Secretary.*

To each of which bonds there are attached fifty interest coupons, numbered, respectively, from one to fifty, both inclusive, in the following form:

$35. £7.

On the first day of October, 1872, the Burlington and Southwestern Railway Company, for and in behalf of the Linneus Branch thereof, will pay thirty-five dollars in U. S. gold coin at its agency in New York, or seven pounds sterling at its agency in London, on the surrender of this coupon to bearer, or if registered to the registered holder thereof, or order, for six months' interest due that day
103 on bond No. —, issued for and secured by and upon said Linneus Branch of said road.

N. P. SUNDERLAND, *Secretary.*

Now, therefore, this indenture witnesseth: That the said Burlington and Southwestern Railway Company, in order to secure the payment of the said bonds and the interest thereon and in consideration of five dollars to it in hand paid by the said party of the second part at the execution and delivery of these presents, the receipt of which is hereby acknowledged, and by virtue of the power and authority in it vested, as hereinbefore stated, to issue said bonds and make this conveyance upon the said branch line of road, has granted, bargained, sold, transferred, and conveyed, and by these presents doth grant, bargain, sell, transfer, and convey, unto the said party of the second part, their successors in said trust and assigns, all the following and all the above described property, to wit: All the present and in future to be acquired property of or in any manner pertaining to the said Linneus Branch of the Burlington and Southwestern Railway Company and all the right, title, interest,
104 and equity of redemption therein, whether of said company or the stockholders in said branch or leased premises—that is to say, all the branch railroad, including the premises leased as aforesaid of the Lexington, Lake and Gulf Railroad Company, now made and to be constructed, extending from the main line of said Burlington and Southwestern railway at or near Unionville, in the county of Putnam, in the State of Missouri, by the way of Linneus and Lexington to Kansas City and by the line of said leased premises from Lexington to Butler, in Bates county, Missouri, and to such other point in Southwestern Missouri as may be determined upon by the board of directors, or however said branch line of road, including said leased premises, may be described or built, including the right of way therefor, road-bed, superstructure, iron, ties, chairs, splices, bolts, nuts, spikes, and all the lands and depot grounds, station-houses, depots, viaducts, bridges, timber, and materials and property purchased and to be purchased or otherwise acquired for the construction and maintenance of said branch railroad, and all the engines, tenders, cars, and machinery and all kinds of rolling stock now owned or to be hereafter purchased by said party of the first part for and on account of said branch railroad, all the
105 revenue and income of said Linneus Branch, and all the

rights, privileges, and franchise relating thereto and property acquired by virtue thereof now in possession or hereafter to be acquired, including machine shops, tools, implements, and personal property used therein or along the line of said branch road, together with all the property of every kind acquired by said first party by virtue of its said lease of said Lexington, Lake and Gulf railroad, and which said branch line of road and leased premises, extending from said town of Unionville by the way of Linneus and Lexington to Kansas City and Southwestern Missouri, as hereinbefore set forth, is known and designated as the Linneus Branch of the Burlington and Southwestern railway:

To have and to hold the said branch line of railway, including said leased premises and property and all and singular the said premises and every part thereof, with the appurtenances, unto the said party of the second part, its successors in said trust or assigns, but for the following purpose and upon the following express trust—that is to say, in case the said party of the first part, for its said branch line, shall fail to pay or cause to be paid the principal
106 or any part thereof or any of the interest on any of the bonds secured or intended to be secured hereby at any time when and where the same may become due and payable according to the terms thereof and for sixty days thereafter, or if default shall be made in payment of moneys required to be paid into the sinking fund as herein provided, and such default shall continue for six months, then and in either case all of said bonds, both principal and interest, shall thereupon, at the option of the holder, become due and payable, and at the request of the holders of one-tenth ($\frac{1}{10}$) of said bonds then unpaid and outstanding the said parties of the second part, their successors in said trust or assigns, may enter into and take possession of all and singular the railroad premises and property hereby conveyed or intended to be conveyed, and as the attorneys-in-fact or agents of said first party, by themselves or their agents duly constituted, have, use, and *employ* the same, making from time to time all needful repairs, alterations, and additions thereto, and after deducting the expenses of such use, repairs, alterations, and additions, apply the proceeds of said premises to the payment *pro rata* of the princi-
107 pal and interest of all such bonds remaining unpaid; or said parties of the second part, their successors in said trust or assigns, at their discretion, may, and on the written request of the holders of one-tenth ($\frac{1}{10}$) of said bonds then unpaid shall, cause the said premises, or so much thereof as shall be necessary to discharge the principal and interest of all such of said bonds as may be unpaid, together with the expense of sale, to be sold at public auction, at the city of St. Louis, in the State of Missouri, after giving sixty days' notice of the time and place and terms of such sale by publishing the same at least once in each week for eight successive weeks next previous to the sale in two of the principal newspapers for the time being published in each of the cities of New York and Boston and in one of the principal newspapers for the time being in the cities of St. Louis, in the State of Missouri,

and Burlington, in the State of Iowa, and upon such sale to execute to the purchaser or purchasers thereof good and sufficient deed or deeds of conveyance in fee simple for the same, which shall be a bar against the said Burlington and Southwestern Railway Company and the said Lexington, Lake and Gulf Railway Company
108 and the stockholders of the said Branch railway, each and all of their successors and assigns, and all persons claiming under them, of all right, interest, or claims in or to said premises or any part thereof.

And the said trustees shall, after deducting from the proceeds of said sale the cost and expense thereof and of managing the said property, including their own reasonable compensation and enough to indemnify and save themselves harmless from and against all liabilities arising from this trust, apply so much of the proceeds of said property as may be necessary to the payment *pro rata* first of the interest and then of the principal of said bonds remaining unpaid, whether the same may be then due and payable or otherwise, and shall restore the residue thereof, if there be any, to the said party of the first part, its successors or assigns, for its said branch, it being expressly understood and agreed that in no case shall any claim be made or advantage taken of valuation, appraisement, redemption, or extension laws by said party of the first part, its successors or assigns, nor any injunction or stay of proceedings be had or any process be obtained or applied for by it or them to prevent such
109 entry, sale, and conveyance as aforesaid; and at any sale of the aforesaid property or any part thereof, whether made under the power herein granted or any judicial authority, the parties of the second part, their successors and assigns, may, by the written request of a majority in interest of the holders of said bonds, bid for and purchase the property so sold or any part thereof in behalf of the holders of the bonds secured by this instrument and then outstanding in proportion to the respective interests of such bondholders.

It is also hereby agreed and understood that it shall be lawful for the said railway company, party of the first part, in the name and for its said branch as aforesaid or its assigns, to dispose of the current net revenues of said road and premises hereby conveyed as it or they shall elect until default shall be made in the payment of the principal or interest of said bonds or some of them, or until default shall be made by said first party, its successors or assigns, in the payment of moneys required to be paid into the sinking fund, or in the performance or fulfillment of the covenants or some of them herein created to be kept and performed by the said first party, its
110 successors and assigns, in and about said branch line of roads as herein set forth.

And the said party of the first part, for itself and its successors and for said branch line and said leased premises, hereby covenants and agrees to execute and deliver any further reasonable and necessary conveyance of said premises or any part thereof to said party of the second part, its successors in said trust and assigns, which counsel may advise for the more fully conveying said premises and carrying into effect the object and purposes of these presents and of

making them embrace the property and effects conveyed or intended to be conveyed.

At the end of every six months, commencing on the first day of January, in the year one thousand eight hundred and eighty-three, the sum of twenty thousand dollars shall be reserved out of the net earnings of the said branch railroad by the said party of the first part and within sixty days thereafter be paid over to said trustees, their successors in said trust and assigns, as a sinking fund for the redemption of the bonds secured by these presents; said trustees shall at once deposit the said sum so paid over in some safe and
111 responsible depository in the city of New York, and the said money, with all accumulations of interest thereon, shall be invested by said trustees in the purchase of the bonds secured by these presents, provided the same can be obtained at not above par and accrued interest; and the bonds so purchased shall be deposited with such responsible depository as said trustees may from time to time decide upon and be immediately registered, stamped, or indorsed as belonging to said sinking fund, but shall remain in force and the interest thereon shall continue to be paid by said party of the first part, acting for and in the name of said branch, its successors or assigns, and the amount of such interest shall be added and applied as a part of the capital of the sinking fund hereby established and be invested in the purchase of other bonds in the same manner as the semi-annual payments of twenty thousand dollars hereinbefore provided for; and preparatory to such respective purchases of bonds the said trustees shall give twenty days' notice thereof in one or more of the daily newspapers published in the cities of New York and Boston at least once a week, and shall make the said pur-
112 chases at the lowest price or prices at which the bonds may be offered pursuant to such notice, but not exceeding ten per cent. premium and accrued interest, and in case the bonds cannot be purchased at such rate within three months after the expiration of the notice aforesaid then the said money shall be invested in these bonds at a higher rate or in State or United States securities, at the discretion of said trustee-.

It is hereby mutually agreed that upon the payment of the principal and interest of said bonds the estate hereby granted to the said parties of the second part shall be void and the right to the premises and property hereby conveyed shall revert to and revest in the said party of the first part, its successors and assigns, for its said branch line as aforesaid, without any acknowledgment of satisfaction, reconveyance, re-entry, or other act.

The party of the first part further agrees at all times to keep an office or agency in the city of New York, where the principal and interest of the bonds hereby secured shall be payable as the same shall become due, and will provide for the transfer and registration of said bonds at the said agency and also for the transfer of the stock of said Linneus Branch at such agency.

113 It is also hereby mutually agreed that the said parties of the second part, its successors in said trust and assigns, shall only be accountable for reasonable diligence in the manage-

ment thereof, and shall not be responsible for the acts of any agent employed by them when such agent shall have been employed with reasonable discretion, and the said party of the second part and their successors in said trust and assigns shall be entitled to reasonable compensation for their labor and services in the management of said trust.

It is further agreed and understood that in case of incapacity, resignation, neglect, or refusal to act on the part of said trustees, which incapacity, neglect, or refusal shall be conclusively determined by the unanimous vote of the board of directors of the said first party, all its rights, estate, interest, power, and control in the premises shall be divested, cease, and determine; and the said board of directors may, by a like vote, supply said vacancy, or, failing to take proceedings therefor within thirty days, the holders of one-tenth of said bonds may apply to any court in the State of Missouri having jurisdiction of the premises to appoint a new trustee or
114 trustees to supply the said vacancy, and such new trustees, appointed in the manner aforesaid, shall become vested for the purpose aforesaid with all the rights and interests requisite to enable him or them to execute the purposes of this trust without any further assurance or conveyance of the same.

But, should it be desirable or necessary, the said parties hereto shall all execute and deliver such releases and conveyances as counsel shall advise.

It is also expressly understood and agreed that said bonds shall have each affixed thereto a proper stamp, required by the laws of the United States, and that they shall stand equally secured by this mortgage, though made, issued, and sold at different times, and that no bond shall be deemed to be secured by or issued under this mortgage unless the same is certified by the trustees herein named or their successors in said trust, and that the proceeds of the above-mentioned bonds of said first party shall be applied to the construction, completion, and equipment of the aforesaid Linneus Branch of the Burlington and Southwestern railway, including the leased premises, in the manner herein provided, and for no
115 other purpose whatsoever.

And the said parties of the second part hereby accept the trust created by these presents.

This mortgage and trust deed is made and entered into on the part of said first party under and pursuant to the laws of the States of Iowa and Missouri and by virtue of an act of the General Assembly of the said State of Missouri, entitled "An act to aid in the building of branch railroads in the State of Missouri," approved March 21st, 1868, as well as under and pursuant to resolutions of the board of directors of said party of the first part, and also of the stockholders of said Linneus Branch of the Burlington and Southwestern railway and the authority contained in said lease, made by said Lexington, Lake and Gulf Railroad Company, and duly made and entered on the minutes of the proceedings of said parties in interest for the purpose and with the intent to secure the payment of said bonds as aforesaid.

In witness whereof the said Burlington and Southwestern Railway Company has caused its corporate seal to be hereto affixed
116 and these presents to be attested by the signatures of its president and secretary, and the parties of the second part have hereunto subscribed their names, to testify their acceptance of the said trust, on the day and year first above written.

[L. S.] BURLINGTON AND SOUTHWESTERN RAILWAY CO.,
By JAMES PUTNAM, *President.*

Attest:
N. P. SUNDERLAND, *Secretary.*

THE FARMERS' LOAN AND TRUST COMPANY,
[L. S.] By R. G. ROLSTON, *P's't.*

Attest: GEO. P. FITCH, *S'c't'y.*

STATE OF NEW YORK, *County of New York:*

Be it remembered that on this 6th day of May, 1872, before me, a commissioner, residing in the city of New York, county of New York, and State of New York, duly commissioned by the Gove-nor of the State of Missouri to take acknowledgments and proofs
117 of deeds and other instruments in writing, under seal, to be used or recorded in said State of Missouri, personally came James Putman, president of the "Burlington and Southwestern Railway Company," who is personally known to me to be the identical person whose name is signed to the foregoing deed of conveyance, who, being by me duly sworn, deposes and says that he resides in the city of Burlington, in the county of Des Moines and State of Iowa; that he is president of the Burlington and Southwestern Railway Company; that he knows the corporate seal of said company; that the seal affixed to the foregoing conveyance is the corporate seal of said company; that it was affixed by order of said company, and that he signed his name to said conveyance by like order as president of said company, and acknowledged that he executed and delivered the said deed as his free and voluntary act for the uses and purposes therein set forth, and that the said company also executed said conveyance as its free and voluntary act for the uses and purposes therein set forth.

In witness whereof I have hereunto set my hand and official seal this 6th day of May, 1872.

118 [L. S.] EDWIN F. COREY, JR.,
Commissioner for Missouri in New York.

UNITED STATES OF AMERICA,
State of New York, City & County of New York, } *ss:*

Be it remembered that on this 6th day of May, in the year one thousand eight hundred and seventy-two, before me, the undersigned, Edwin F. Corey, Jr., a commissioner resident in the city of New York, duly commissioned & authorized by the executive au-

thority & under the laws of the State of Missouri to take the acknowledgement of deeds, &c., to be used or recorded therein, personally appeared Rosewell G. Rolston, to me personally known to be the president of the Farmers' Loan & Trust Company, who, being by me duly sworn, did depose & say that he resides in the city of New York; that the seal which is affixed to the within instrument is the corporate seal of the said company, & that the said seal was thereto affixed by authority of the board of directors of said company, & that he thereupon subscribed his name as president thereto by like authority; and the said Rosewell G. Rolston further acknowledged to me that he executed the said instrument as
119 the free, voluntary act and deed of said company for the purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day & year aforesaid.

[L. S.] EDWIN F. COREY, JR.,
Commissioner for Missouri in New York.

STATE OF MISSOURI, }
County of Putnam, } *ss:*

In the Recorder's Office.

I, Milton Canby, clerk of the circuit court and *ex officio* recorder of said county, hereby certify that the within instrument of writing was, on the 18th day of May, 8 a. m., A. D. 1872, duly filed for record in this office and is recorded in the records of this office in book vol. 10, at page- 498 to 510, inclusive.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Unionville, this 18th day of May, A. D. 1872.

[L. S.] MILTON CANBY, *Recorder.*

120 *Decree of Foreclosure.*

In the Circuit Court of the United States for the Western District of Missouri, at Jefferson City. In Equity. April Term, 1876.

THE FARMERS' LOAN & TRUST COMPANY
vs.
THE BURLINGTON & SOUTHWESTERN RAILWAY COMPANY, EBER B. Ward's Executors, Wells, French & Co., J. W. Barnes, J. H. Martin, Joseph Combs, John H. Wilkerson, Marion Canes, H. C. Pravit, Casperson & Combs, Casperson & Son, W. W. Davis, Warren McCullough, McCullough & Beebe, H. L. Thompson, John Q. Boner, Edmund Ash, Joseph Stanley, J. Bupper, E. Burkman, Thomas Lau Clad, Lewis Elley, J. A. Quailley, S. J. Boone, John L. Runnels, B. F. Northent, E. D. Edwards, G. D. Bupp, John T. Heath, and Others.

121 This cause came on now to be heard; after bill and amendments, cross-bills and amendments, answers to bills, amendments, cross-bills, and amendments thereto, replications, exhibits, and report of the special master appointed at the last term

of this court; Grant, for the plaintiffs; Hatfield, for the B. & S. W. R'y Co., appears, withdraws answers and cross-bill, and confess- allegations of the bill; Smythe, for Ward's executors, and withdraw- answer and cross-bill and consent- to decree. Muller, Butler, Lay, Belch appear for Combs, Wilkinson, & others, claiming liens or judgments in Missouri. Hall & Baldwin appear for Wells, French & Co., and Barnes and Martin.

And thereupon the court, having duly considered the master's report, confirms and approves the same as to the facts found by him, and upon the law arising on said facts finds that Warren McCullough has a mechanics' lien, under the act of 21st March, 1873, for 4,912 ties furnished to said railroad company at the price of 35 cents each, making the sum of 1,719.20 dollars; that Casperson and
122 Combs have a like lien for 2,196 ties furnished to said company, after the passage of said act, at 35 cents per tie, making $769.60.

That H. L. Thompson and McCullough & Beebe have a like lien on 3,814 bridge ties furnished to said railroad Co. at the price of 50 cents each, making the sum of $1,907.00.

That on said ties McCullough & Beebe have a lien of 13 cents a tie for sawing the same, making the sum of $495—part of said $1,907—and it appearing from the answer of McCullough & Beebe that a portion of said sum of $495.00 has been paid, and that the balance thereon was due to them on the 8th of Oct., 1874, the sum of $356.76, and which sum is to be deducted out of said $1,907.00, or a *pro rata* share thereof.

That said liens of Warren McCullough, H. L. Thompson, and McCullough & Beebe are a prefer-ed lien on said ties furnished by them to the lien of the plaintiffs under their mortgage, and a second lien, subsequent to said mortgage, on the other property included in the same; and upon the sale which is to be made of said mortgaged property, as hereinafter set out, the master will sell said 4,912 ties separate from the other property and apply the proceeds
123 of such sale in payment of said lien of Warren McCullough, and said master will sell said 2,196 ties in like manner & apply the payment to said Casperson & Combs, and that he will sell said 3,812 bridge ties separate from the rest of said property and apply the proceeds of said sale to the payment of the lien thereon in favor of McCullough & Beebe and H. L. Thompson in the proportions above set forth.

And it is further ordered and decreed that all the sales under said judgments or attachments of Combs, Wilkeson, Cave, Preevet, Boner, McCullough, McCullough & Beebe, H. L. Thompson, Casperson & Combs, Casperson & Son, John Q. Boner, W. W. Davis, and others of said ties or any other property of said Burlington & Southwestern R'y Co. be set aside and annulled, and that said judgments in the State courts shall stand as record liens to said mortgage, giving to said holders thereof a right to redeem said mortgage, and their cross-bills, except those of Warren McCullough, McCullough & Beebe, and H. L. Thompson, are dismissed at their costs; and as to the cost-

of Warren & McCullough, McCullough & Beebe, & H. L.
124 Thompson the same are to be paid by the Burlington, Southwestern Railway Co. or deducted, if not paid by them, out of the proceeds of the sale of said ties.

And it is ordered that all the purchases under the sales of said judgments set out in the defendants' answers be set aside and annulled, and all the property not yet delivered to the receiver be delivered to him by the purchasers under said sales.

And the court further finds as matter of law that the said D. L. Wells, H. L. Norton, E. C. French, and F. E. Walker, composing the firm of Wells, French & Co., and James N. Martin and J. W. Barnes are not entitled under the laws and statutes of the State of Missouri to mechanics' liens upon the property of the said railway Co. situate and extending into said State, as claimed by them, for labor performed and material furnished by them, respectively, under their respective contracts, as alleged and set forth, in the construction of said railroad, and that the equity in said cause is with the complainants upon the issues of the original bill and the cross-bill.

It is therefore ordered, adjudged, and decreed by the court
125 here that the cross-bill of the said Wells, French & Co. and of said J. N. Martin and J. W. Barnes do stand dismissed out of this court with the costs made and accruing upon the issues of their answer and cross-bills respectively taxed against them respectively.

But it is ordered, adjudged, and decreed that this decree is without prejudice to the said Wells, French & Co. and said Martin and J. W. Barnes or either of them to proceed in any court or courts of law or in equity to enforce their several contracts and recover thereon any sum or sums due them and to establish mechanics' liens therefor upon any part or portion of the property of the said R'y Co. situate or lying within the State of Iowa, and said decree shall be without prejudice to and right of claim of priority of such mechanics' liens claimed or asserted by said parties or either of them over the mortgage of the said complainants herein upon the property of the said railway in Iowa; but said parties or either of them shall be at liberty to proceed in any cause now pending or hereafter brought in any court in the State of Iowa to recover the amounts due there and to establish mechanics' liens for labor performed and material
126 furnished in the construction of said railroad upon the property of said railway in the State of Iowa, and to recover and obtain such other and further relief in that respect against the complainants, the defendants, or either of them as may be decreed necessary and proper as if this decree had not been ordered, signed, and enrolled.

And the court finds that there is due the plaintiffs, as trustees under said mortgage of the Linneus Branch of the Burlington & Southwestern Railway Company executed on the 1st April, 1872, the principal sum of one million six hundred thousand dollars ($1,600,000), which is evidenced by 1,600 bonds of $1,000 each, payable to bearer, and there is due for interest on said bonds at the rate of seven per cent. from the said first day of April, 1872, to the 20th

day of May, 1876, making the sum of $454,222.00 for interest and a total of principal and interest of $2,054,222.00, which sum bears interest at 7 per cent. per annum from the 20th of April, 1876, and the above sum, with interest & costs, taxed at —, it is ordered and
127 decreed that the defendant, The Burlington & Southwestern R'y Co., pay to the plaintiffs within ten days from the 20th of May, 1876, and in default thereof any of the other defendant's creditors by judgment or mechanics' lien claims allowed by this court are permitted to redeem said mortgage in the order of priority of their liens by the payment of said sums in ten days thereafter, and upon such payment it is ordered that said plaintiffs convey by proper deed all the right, title, & interest which the plaintiffs acquired to said mortgaged property by virtue of their mortgage to the party redeeming said debt.

And upon default of said payment and failure to redeem said premises it is ordered and decreed that the equity of redemption of all said defendants to the said mortgaged estate be forever bar-ed and foreclosed, which mortgaged estate is described as follows: All the real & personal property of said Burlington and Southwestern Railway Co. in said Linneus Branch railroad owned at the date of said mortgage and since acquired in any manner appertaining to said branch, and all the right, title, and equity of redemption therein,
128 whether of said company or the stockholders thereof in said branch or any premises leased therewith; all the branch railroad, including the premises leased, named in said mortgage, extending from the main line of said Burlington & Southwestern Railway Company at or near Unionville, in the county of Putnam, in the State of Missouri, by the way of Linneus and Lexington to Kansas City, and by the line of said leased premises from Lexington to Butler, in Bates county, Missouri, and to such other point in Southwestern Missouri as was determined upon by the board of directors of said company, or however said branch line of said railroad, including said leased premises, may be described or built, including the right of way therefor, road bed, superstructure, iron, ties, chairs, splices, bolts, nuts, spikes, and all the lands and depot grounds, station-houses, depot, viaducts, bridges, timber, and materials and property purchased and to be purchased or otherwise acquired after the date of the mortgage for the construction and maintainance of said railroad, and all the engines, tenders, cars, and machinery, and all kinds of rolling stock owned at the
129 date of said mortgage or thereafter purchased for and on account of said branch; all the revenues and income of said branch, and all the rights and privileges and franchises relating thereto and property acquired in virtue thereof, then in possession or thereafter acquired, including machine shops, tools, implements, personal property, and —thereon or along the line of said branch railroad, together with all the property acquired by said B. & S. W. R'y Co. by virtue of its lease of said Lexington, Lake and Gulf R. R., and which branch line of said leased road & premises extending from Unionville by the way of Linneus to Kansas City and South-

western Missouri is known and designated as the Linneus Branch of the B. & S. W. railway.

And the receiver of said property is required to render to the master herein appointed an account of the income and expenses of said branch railroad from the date of the appointment to the day of sale, and any balance in his hands is to be paid to the master and by him credited on the amount due on said mortgage, and
130 the property is to be sold for the satisfaction of the residue.

And the said sale is to be made subject to the lien created by order of this court for receiver's certificates of debentures to an amount not exceeding $200,000 for the purpose of completing about twenty-three miles of said branch south of Unionville.

And Harry Lacey is hereby appointed a special master to sell the property above described in said mortgage as well as the ties allowed on the lien claims of Warren McCullough, H. L. Thompson, and McCullough & Beebe, and he is ordered to cause said sale to be advertised in a short form to take place at such place as he may designate in Putnam county near the line of Iowa, the advertisement to be made for four successive weeks before the day of sale in one newspaper published in the city of Boston and one published in said district; said papers to be selected by the master.

And before entering upon the duties of said office the master shall give bond, to be approved by one of the judges of this court, in the sum of fifty thousand dollars ($50,000), conditioned for the faithful performance of his duties.

131 And upon the said sale the master is authorized to receive bids, payable in cash or in the bonds secured by the said mortgage, and if the highest bid shall be for cash alone the purchaser shall pay to the master the sum of $50,000, to be by him deposited in some bank of his selection and reported forthwith to this court.

And at said sale the said John W. Brooks and Alpheus Hardy, trustees, or such other agent as a majority of said bondholders may appoint, are authorized to bid, at the request of a majority of said bondholders, and afterwards convey to such corporation, as said majority may direct, for said mortgaged property in trust for all the holders of said mortgaged bonds or such of them as may in writing assent thereto, and upon said bid to pay for the same in bonds of said corporation.

And such of said bondholders as do not assent and sign the authority to make such bid and purchase are allowed six months from the day of sale to deposit their bonds with their master and assent to said sale and receive their *pro rata* share of the
132 property in such corporation as the bondholders may organize to own and operate the same, and upon the refusal of any bondholders to accept their share of said bid and purchase they shall be paid by the assenting parties, through the master or by deposit in court for them, their *pro rata* share of cash on the amount of said bonds held.

And all the bondholders assenting to said sale and purchase for their benefit shall be liable for the then *pro rata* share of receiver's

certificates heretofore authorized, so far as the same may be issued prior to the confirmation of the sale.

And said sale shall be made by the said master without valuation and appraisement and without the right of redemption after sale.

And said master is directed and required out of the proceeds of said sale to pay all the costs and expenses of said foreclosure and sale proper, including attorneys' fees and fees of trustees, the same to be first approved by a judge of this court.

And said master is ordered to prepare for the purchaser a deed of said property when sold by him, and present the same, to-
133 gether with a report of his sale, to this court or a judge thereof for approval.

The right to make further orders herein is reserved.

JOHN F. DILLON, *Judge.*

Deed of Trust — L., L. & G. R. R. Co. to M. Chapman, Trustee, Dated Jan. 16, 1872.

Deed of trust of the Lexington, Lake & Gulf R. R. Co. to M. Chapman, trustee, of January 16th, 1872.

This indenture, made on the 16th day of January, A. D. 1872, between the Lexington, Lake & Gulf Railroad Company, corporation duly incorporated and existing under the laws of the State of Missouri, party of the first part, Moses Chapman, of the county of La Fayette and State of Missouri, party of the second part, and Henry L. Newman, of the city of Leavenworth and State of Kansas, and John W. Waddell, of La Fayette county, Missouri, party of the second part, witnesseth:

Whereas the party of the first part own and possess the power by the laws of the State of Missouri to construct, maintain, and operate a railroad in the said State from the city of Lexington, in the State of Missouri, to the south boundary line of the State of Missouri, and of which said line and distance the said party of the first part
134 has already constructed the road-bed of said railroad from said city of Lexington to the town of Butler, in the county of Bates, and ties furnished thereon sufficient to about tie that *that* part of said road between said city of Lexington and the city of Pleasant Hill thereon, besides and including the dredging thereon; and whereas said party of the first part are indebted for and stand in need of money to pay for the construction of said road-bed and materials furnished thereon, and were, on the completion of said work, indebted to Monroe & Co., contractors thereon, in the sum of ten thousand six hundred & eighty-two $\frac{7}{100}$ dollars, evidenced by the promissory note of said party of the first part for that sum, executed by said party of the first part, dated October 12th, A. D. 1871, one day after date, with interest from *due* at the rate of ten per cent. per annum, which said note is still due and unpaid by said party of the first part, and said note being given for said work, and also said party of the first part was, on the completion of said work, also indebted to and owing one Lawrence Dean, contractor thereon, in the

sum of two thousand dollars, evidenced by the promissory
135 note of said party of the first part for that sum, executed by said party of the first part, dated October 12th, A. D. 1871, one day after date, with interest from date at the rate of ten per cent. per annum, and which said note is still due and unpaid, and amounting in the aggregate to the sum of twelve thousand six hundred and eighty-two and $\frac{74}{100}$ dollars, and both being for debts contracted by said railroad company for the completion, furnishing, and construction of said railroad of said party of the first part:

Now, therefore, in order to secure the payment of said two notes and in consideration of the premises and of the sum of one dollar paid to the said party of the first part (the receipt whereof is hereby acknowledged), the said Lexington, Lake & Gulf Railroad Company, by virtue of law and under and in pursuance of orders of the board of directors thereof heretofore had and done, have granted, bargained, and sold, conveyed and confirmed, and by these presents do grant, bargain, sell, convey, and confirm, unto the said Moses Chapman, party of the second part, his representative or successor, in trust and for the uses and trusts hereby created, all and singular
136 the said road of the said party of the first part as the same is now surveyed, constructed, and being constructed and leading from said city of Lexington to said town of Butler, in the State of Missouri, a distance of about eighty-one miles, together with all and singular the right of way for said road belonging to or acquired by the said party of the first part, and also the right of said party of the first part to construct and maintain along said route and from said city of Lexington to the south boundary line of said State a railroad as well as all other rights, privileges, and franchises belonging to the said party of the first part in, upon, or pertaining to said railroad, including the road-bed, made or to be made, its track, laid or to be laid, depot grounds, rails, fences, bridges, ties, and all other materials, properties, or things, as well as all other property appertaining to said road, now owned or possessed or acquired or hereafter to be owned, possessed, or acquired, and all lands and real estate to which said party of the first part may become entitled through or by reason of the construction of said railroad, together with all and singular the rights, privileges, and
137 corporate property and franchises of said railroad company and all the appurtenances to the above-described premises belonging or in anywise appertaining:

To have and to hold the said granted premises unto the said party of the second part, his successor or legal representative, forever, in trust, nevertheless, and for the uses and purposes in this indenture expressed—that is to say:

Whereas said Lexington, Lake and Gulf Railroad Company did, on the 12 day of October, A. D. 1871, make and deliver its two certain promissory notes in words & figures as follows, one of which is as follows, to wit:

$10,682.74. LEXINGTON, Mo., *Oct. 12th*, 1871.

One day after date the Lexington, Lake & Gulf Railroad Co. promise to pay Monroe & Company, or order, ten thousand six hundred and eighty-two $\frac{74}{100}$ dollars, for value received, negotiable and payable, without defalcation or discount, with interest from *due* at the rate of ten per cent. per annum.

(Signed) LEXINGTON, LAKE & GULF R. R. CO.,
By JOHN REID, *The President.*

Stamps, $5.35.

Endorsed on the back thereof by said Monroe & Co. to Henry L. Newman.

And the other of which is as follows, to wit:

$2,000.00. LEXINGTON, Mo., *October* 12, 1871.

138 One day after date, for value received, the Lexington, Lake and Gulf Railroad Co. promise to pay Lawrence Dean, or order, two thousand dollars negotiable and payable, without defalcation or discount, with interest from date at the rate of ten per cent. per annum.

(Signed) LEXINGTON, LAKE & GULF
RAILROAD CO.,
By JOHN REID, *The President.*

Stamps, $1.00.

Endorsed on the back thereof by said Lawrence Dean to John W. Waddell.

Now, if the said Lexington, Lake and Gulf Railroad Company, its assigns or successors, shall pay the respective sums of money specified in said notes, with all interest that may be due thereon on or before the first day of March, A. D. 1872, then this indenture and deed of conveyance shall be void, and the said property and mortgaged lands, premises, rights, and franchises hereinbefore conveyed shall be released at the expense of the said party of the first part; otherwise the same shall remain in full force; and in case of default or failure of said party of the first part to pay off and discharge said two notes herein described and all interest thereon within and by the time hereinbefore mentioned, then it shall be lawful
139 for said Moses Chapman, trustee as aforesaid, his representative, representatives, successor, successors, or assigns, upon the written request of said party of the third part or either one of them, their representatives or assigns, to proceed to sell the said mortgaged premises and all and singular the said premises and franchises so conveyed and herein described in entirety, and upon such written request said trustee, his representative or successor, as aforesaid, shall cause the said premises, real and personal estate, rights, & franchises to be sold at public auction at the court-house door, in the city of Lexington, county of La Fayette, for cash, first giving at least thirty days' notice of said sale, publishing the same

in some newspaper published in said county of La Fayette, in the State of Missouri, and on such sale to make, execute, and deliver to the purchaser or purchasers thereof a good and sufficient deed in fee simple for the same, which shall be a bar against the party of the first part, its successors and assigns, and all persons claiming or to claim under it or them, of all rights, interest, or claims of, in, or to said premises, lands, property, rights, or franchises herein
140 described or any part thereof; and the said party of the second part, after deducting from the proceeds of the sale the costs and expenses thereof, shall apply so much of the proceeds as may be necessary to the payment of said principal and interest due & still unpaid on said two promissory notes or either one of them, and shall pay the remainder of said proceeds to the said party of the first part, its successors or assigns; and in the event of said sale and having so purchased said premises the purchaser or purchasers thereof shall have the right to take possession of all and singular the said premises, property, and franchises so conveyed, and to have, use, own, and enjoy the same in such manner as shall seem fit and proper in the premises, and to that end and for the purpose of completing said railroad and operating the same the said purchaser or purchasers as aforesaid may at any time take such lawful measures as he or they or his or their successors or assigns shall deem for their interest, and to organize a new company or corporation, and which said new company or corporation shall be organized upon such terms, conditions, and limitations and in such manner
141 as the parties then in interest may deem best, and thereupon to reconvey the premises and property so purchased by him or them to said new company or corporation; and the said trustee, Moses Chapman, covenants to and with the said party of the first and *second* part-, severally, faithfully to perform & fulfill the trust herein created.

In witness whereof the said Lexington, Lake and Gulf Railroad Company, by order of its board of directors, have hereunto affixed its corporate seal and caused the same to be signed by its president & secretary, and the said trustee has hereto set his hand and seal, the day and year first above written.

JOHN REID,
President of Lexington, Lake & Gulf Railroad Company.
[L. S.] GREEN D. SATTERFIELD,
Secretary Lexington, Lake & Gulf Railroad Company.
M. CHAPMAN. [L. S.]

STATE of MISSOURI, *County of La Fayette:*

Be it remembered that on this 16 day of January, in the
142 year one thousand eight hundred and seventy-two, before me, the undersigned, John E. Arnold, a notary public within and for said county of La Fayette and State of Missouri, and duly authorized by law to take acknowledgments of deeds, mortgages, &c., personally appeared John Reid, who is to me personally known to be the same person whose name is subscribed to the foregoing

and annexed instrument as president of the Lexington, Lake and Gulf Railroad Company, and the said John Reid acknowledged said instrument to be the act and deed of said railroad company, and that he executed the said deed and instrument of writing as and for the act and deed of said Lexington, Lake & Gulf Railroad Company for the uses and purposes mentioned in said instrument.

In witness whereof I hereunto set my hand & affix my official seal the day and year last above written.

[L. S.] JNO. E. ARNOLD,
Notary Public.

STATE OF MISSOURI, *County of La Fayette:*

143 Be it remembered that on this 18 day of January, in the year eighteen hundred and seventy-two, before me, John E. Arnold, a notary public within and for said county and State, and duly authorized by law to take acknowledgments of deeds, &c., personally appeared Green D. Satterfield, who is well known to me to be the same person whose name is subscribed to the foregoing instrument of writing as secretary of the Lexington, Lake & Gulf Railroad Company, and said Green D. Satterfield acknowledged that he executed the said deed as & for the act & deed of the Lexington, Lake & Gulf Railroad Company for the uses and purposes therein mentioned.

In witness whereof I hereunto set my hand & affixed my official seal the day and year last above written.

[L. .S] JNO. E. ARNOLD,
Notary Public.

The above deed of trust was filed for record Feb'y 21, 1872, C., 2.50 p. m.

WM. HISCON, *Recorder,*
By JNO. H. CURRY, *D. R.*

STATE OF MISSOURI, } *ss:*
County of La Fayette, }

144 I, Jacob D. Conner, recorder of deeds within and for the county aforesaid, do hereby certify that the above and foregoing is a full, true, and complete copy of the matter therein contained as fully as the same appears of record in my office in Deed Book No. 9, page 223 & following.

In testimony whereof I have hereunto set my hand and affixed my official seal, in Lexington, this 26 day of April, A. D. 1881.

[L. S.] J. D. CONNER, *Recorder.*

Deed of M. Chapman, Trustee, to H. L. Newman, Trustee.

Deed of Moses Chapman, trustee, &c., to Henry L. Newman, trustee for himself & Waddell.

Whereas the Lexington, Lake and Gulf Railroad Company, by its certain deed of trust, dated January 16th, A. D. 1872, duly made by its president and sealed with the corporate seal of said company and

recorded in the recorder's office of La Fayette county, Missouri, in book No. 9, at pages 223, 224, 225, 226, and 227, conveyed to the undersigned trustee the property hereinafter described, in trust, to secure to Henry L. Newman and John W. Waddell the pay-
145 ment of two certain promissory notes of said company, both made October 12th, A. D. 1871, one for the sum of $10,682.74, payable one day after date to the firm of Monroe & Co., or order, and the other for the sum of $2,000, payable to the order of Lawrence Dean, both being made for value received, and bearing interest from date at the rate of ten per cent. per annum, both of said notes being given for work and labor by said last-named parties as contractors in and about the building and construction of the road-bed and railroad of said company, and both said debts being contracted in and about said construction of said road, and which said first-named note was duly endorsed & assigned by said Monroe & Co. to said Henry L. Newman, and the said second note by said Dean to said Waddell, and said deed of trust was to secure said assignees of said notes the full payment thereof and all interest thereon on or before March 1st, A. D. 1872; and whereas default was made in the full payment of said note so assigned to said Henry L. Newman, and the same was not paid on or before said March 1st, A. D. 1872, but default was made therein and the same remains still due and unpaid, as provided in said deed:

146 Now, therefore, I, the said trustee in said deed of trust, in conformity with the provisions thereof and the powers to me therein granted, and at the written request of the said Henry L. Newman, the lawful holder of said note for said sum of $10,682 and interest thereon, and one of the beneficiaries in said deed of trust, did proceed to execute the powers to me given by said deed of trust, and did, on Tuesday, February 20th, 1877, having previously given thirty days' notice of the time, terms, and place of sale and of the property to be sold by advertisement printed in the Lexington Weekly Intelligencer, a newspaper published in the city of Lexington and county of La Fayette and State of Missouri, a copy of which said advertisement is hereto annexed, at the court-house door, in the city of Lexington, county of La Fayette and State of Missouri, expose to sale for cash to the highest bidder, at auction, the said property, real and personal estate, rights, and franchises described in said deed of trust and hereinafter described, and at said sale Henry L. Newman as trustee, being the highest and best bidder for the sum of five thousand dollars, the same was struck off and sold to him at that price and sum; and now, therefore, know all men by these presents
147 that I, the undersigned, Moses Chapman, in consideration of the premises and the sum of five thousand dollars to me paid by the said Henry L. Newman as trustee, all of the county of St. Louis and State of Missouri, do bargain, sell, and convey unto him, the said Henry L. Newman, trustee, the property, rights, and franchises in said deed of trust described as follows, to wit: The road of said Lexington, Lake and Gulf Railroad Company as the same is surveyed and being constructed, and leading from the city of Lexington, in said La Fayette county, Missouri, to the town of

Butler in Bates county, in said State, a distance of about eighty miles, together with all and singular the rights of way for said road belonging to or acquired by said company, and also the right of said company to construct and maintain along said route and from said city of Lexington to the south boundary line of the State of Missouri said road, as well as all other rights, privileges, and franchises belonging to said company in, upon, or pertaining to said road then owned, or possessed, or acquired, or that might thereafter be owned, possessed, or acquired, and all lands and real estate
148 to which said company might become entitled through or by reason of the construction of said railroad, together with all and singular the rights, privileges, and corporate property and franchises, including its road-bed, made or to be made, its track, laid or to be laid, depot grounds, rail fences, bridges, ties, and all other materials, properties, or things appertaining to said company and to the full extent as set forth in said deed of trust, with all the properties, rights, privileges, and franchises, powers, matters, and things therein granted, included, and mentioned in entirety, and all and singular and each and every part and parcel thereof, as fully set forth and authorized in said deed of trust; to have and to hold unto the said Henry L. Newman, trustee as aforesaid, his heirs and assigns, forever.

In witness whereof I, the said trustee in said deed of trust mentioned, have hereunto set my hand and seal the day and year first above written.

MOSES CHAPMAN, [L. S.]
Trustee.

STATE OF MISSOURI, } *sct:*
County of La Fayette, }

Be it remembered that on the 22nd day of August, A. D.
149 1877, before the undersigned, a notary public within and for the county of La Fayette and State of Missouri, personally came Moses Chapman, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as party thereto, and acknowledged the same to be his act and deed as trustee for the purposes therein contained.

In testimony whereof I have hereunto set my hand and affixed my official seal, at office, in the city of Lexington, the day and year last above written.

[L. S.]
JNO. E. ARNOLD,
Notary Public, La Fayette County, Mo.

Commissioned as notary public 7th day of January, A. D. 1875, and same will expire 7th day of January, A. D, 1879.

Filed for record August 5th, 1878, @ 9 a. m.

STATE OF MISSOURI, } *ss:*
County of La Fayette, }

I, Jacob D. Connor, recorder of deeds within and for the county aforesaid, do hereby certify that the above and foregoing is a full,

true, and complete copy of the matter therein contained as
150 fully as the same appears of record in my office in deed book No. 35 pages 91, 92, & 93.

In testimony whereof I have hereunto set my hand and affixed my official seal, in Lexington, this 30th day of August, A. D. 1879.

[L. S.] JACOB D. CONNOR, *Recorder.*

Notice of Application for Leave to Borrow Money.

Petition of receiver for authority to borrow money & notice.

In the Circuit Court of the United States for the Western District of Missouri.

THE FARMERS' LOAN AND TRUST COMPANY, Complainants,

vs.

THE BURLINGTON & SOUTHWESTERN RAILWAY COMPANY and Others, Respondents.

Notice.

To the said Farmers' Loan and Trust Company, complainants in the foregoing cause, and the Burlington & Southwestern Railway Company, John W. Brooks, Alpheus Hardy, and James F. Joy, trustees, defendants:

You and each of you are hereby notified that Elijah Smith, receiver in the foregoing-entitled cause, appointed by said court,
151 will, on the 10th day of January, 1880, or so soon thereafter as practicable, make application (by petition therefor, setting out the reasons in full) to Hon. George W. McCrary, judge of said circuit court, at chambers, at the city of Saint Louis, in the State of Missouri, for authority to said receiver to issue receiver's certificates of indebtedness in the sum of three hundred thousand dollars to enable the receiver to borrow said sum of money, to be used in completing and constructing that portion of the Linneus Branch of the Burlington & Southwestern railway extending from Lexington, in La Fayette county, Missouri, to Bates & Vernon counties, in said State, being & consisting of that portion of said line acquired from the Lexington, Lake & Gulf Railroad Company, said certificates of indebtedness to be and constitute a first lien upon that portion of said line and no other, and not to constitute any indebtedness against any other portion of the property included in the decree of foreclosure in said cause, except upon said line southwardly from Lexington & such additions thereto as may be made by said receiver with funds arising from said loan.

152 And if you have cause to show why said order should not be made you are requested to file your objections with said judge at or before the said 10th day of January, 1880.

ELIJAH SMITH, *Receiver,*
By P. HENRY SMYTHE,
His Solicitor & Counsel.

BOSTON, *Jan'y 3d*, 1880.

Service of the within notice is hereby accepted.

BUR. & S. WESTERN R'WAY CO.
ELIJAH SMITH, *Pres't.*

We admit service of the within notice.
Jan'y 7, '80.

THE FARMERS' LOAN & TRUST CO.,
By R. G. ROLSTON, *Pr's't.*

Petition for Leave to Borrow Money.

In the Circuit Court of the United States for the Western District of Missouri. In Equity.

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE BURLINGTON AND SOUTHWESTERN RAILWAY COMPANY and Others. } No. 297.

Petition.

153 The petition of Elijah Smith, receiver, for authority to borrow three hundred thousand dollars and to issue certificates of indebtedness therefor, and to make the same a lien on that portion of the railroad acquired by contract with the Lexington, Lake & Gulf Railroad Company.

And now comes Elijah Smith, heretofore duly appointed receiver in the foregoing-entitled cause now pending in said court, and represents the following facts:

That a portion of the property coming into his custody and control as receiver is a line of railroad, partly constructed, extending from Lexington, in La Fayette county, Missouri, to the town of Butler, in the county of Bates, being a portion of the property acquired by contract with the Lexington, Lake & Gulf Railroad Company; that said road is graded and bridged nearly the entire distance from Lexington to Butler, a distance of about 82 miles; that said work was done some years ago and is depreciating in value; that said portion of road, if completed, will be of great value to the parties in interest, and the circumstances are such that it is important
154 that said portion of road should be completed at once, and before the sale and confirmation under the decree in this case can be had; that, by reason of the contract with said L., L. & G. Railroad Company, the statutes of the State of Missouri requiring railroads to be completed within a certain time, and that said roadbed and bridges are rapidly going to decay & the field is threatened to be occupied by a rival line which will destroy the value of said property, it is important that said road should be ironed & equipped for traf-ic at once to protect, preserve, & save said property to the parties in interest.

Petitioner has served parties in interest with notice of this application, &, so far as he is advised, there is no opposition thereto, and he says that the interest of all parties will be much enhanced by the

commencement of work immediately on said road. He, therefore, in view of the facts, prays your honors to grant to him authority to employ the necessary labor and purchase the necessary material, land for right of way & stations, &c., & the right to take subscription & donations to aid in said work and whatever else may be necessary to
155 complete said railway to the south line of Bates county &, further, if desired advisable, from Lexington or Pleasant Hill, and, to this end, asks for authority to borrow the sum of three hundred thousand dollars for said purpose & of carrying out said authority, and that he be allowed and authorized to issue his certificates of indebtedness, payable at such time and at such rate of interest, not exceeding seven per centum per annum, as may by said receiver be deemed advisable, and that said indebtedness so created shall be a lien upon said portion of said road before described only and said lien shall be prior to all other liens thereon, but said indebtedness to constitute no claim against any other property in the receiver's hands nor any other fund, except that pertaining thereto, to wit, said part of said railroad lying south of Lexington & such additions thereto & property as may be made or acquired by said fund so borrowed, & for such other order as may be proper & equitable in the premises.

P. HENRY SMYTH,
Solicitor for Petitioner.

Petitioner also asks for authority to settle and adjust by
156 payment or purchase any claims against said Lexington, Lake & Gulf Railway Company which may seem to be prior to or adverse to the claims of the Burlington & Southwestern Railway Co. under the contract by which said L., L. & G. R. was acquired.

P. H'Y SMYTH,
Solicitor for Petitioner.

Amendment to Petition of Elijah Smith, Receiver, for Authority to Borrow Money, &c.

Amendment to the petition of the receiver for authority to borrow money, issue receiver's certificates, &c., &c.

In the Circuit Court of the United States for the Western District of Missouri.

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE BURLINGTON & SOUTHWESTERN RAILWAY COMPANY and Others.

Amended petition for authority to borrow money.

And now comes Elijah Smith, receiver, and for an amendment to his petition heretofore presented says that it is necessary
157 in building the road herein mentioned to extend it — miles south of Butler in order to secure fully the benefits contemplated, and that by carefully prepared estimates by competent men,

engineers who have been sent over the line by your —, it will require $500,000 *dollars* to build & equip said road for traffic.

2. That the contract of lease between the Lexington, Lake & Gulf railroad and the Burlington & Southwestern Railway Company transfer-ed said property to the lessee, The B. & S. W. R. W. Co., for the period of 1,000 years, with the right to mortgage the same as a part of which was known as the Linneus Branch of the said Burlington & Southwestern railway; that in pursuance of said contract said Burlington & Southwestern Railway Co. did execute to the plaintiff in this suit, The Farmers' Loan & Trust Company, a mortgage deed conveying and covering all the property, rights, & franchises of said Lexington, Lake & Gulf Railroad Company so granted by said lease to the said B. & S. W. R. W. Co.; that under said mortgage there was issued the sum of $1,600,000 in bonds, which were secured by said mortgage, & it is upon this mortgage the present suit
158 was brought for foreclosure and the decree herein entered; that said bonded indebtedness included in the decree of foreclosure herein, being some — dollars per mile of road, is largely in excess of the value of the property, so that there is no interest of said L., L. & G. Railroad Co. which can be in any manner affected by this order, and that now the only real parties in interest & whose rights can be affected are the said bondholders under the Linneus Branch mortgage, represented by the before-mentioned Farmers' Loan & Trust Company, the complainants herein, both the company and the Lexington, Lake & Gulf Railroad Company having parted with their interest by the lease and mortgage hereinbefore refer-ed to.

3. Your petitioner further says that it is greatly to the interest of the parties that said line of road should be built at once; that it extends into a most valuable coal deposit or through a fruitful country, & if lost by delay will be greatly to the damage and injury of the parties in interest; that there is no other legal way by which it can be accomplished.

The custody of the court under the proceedings prevents the
159 parties in interest from creating a lien to secure the necessary money. A delay for sale, confirmation, & reorganization will defeat the desired object, and without immediate action by the proper authority your petitioner states, on information and belief, said benefits to be derived from the completion thereof will be lost to the parties in interest & to probably the entire loss of the property, which has had over $600,000 expended upon it to put it in its present condition, and petitioner believes this order and authority necessary to save said property from deter*ori*ation & final loss.

P. HENRY SMYTH,
Solicitor for Petitioner, Receiver.

STATE OF MISSOURI, *St. Louis County:*

Elijah Smith, being duly sworn, on oath says that he is the petitioner named in the foregoing amendment & the original petition; that he knows the contents of both, and the statements therein contained are true, as I verily believe. ELIJAH SMITH.

Subscribed in my presence & sworn to before me this 26 day of January, 1880.

160 A. P. SELBY,
U. S. Commissioner, East. Dist. Mo.

Order on Petition to Borrow Money.

Let the order be made as prayed for in the petition and amended petition upon filing the written consent of two-thirds of the bondholders under the mortgage to the Farmers' Loan and Trust Company and with concurrence of the judge of the district court United States for the western district of Missouri.

At chambers, St. Louis, Mo., Jan'y 26, 1880.

GEO. W. McCRARY,
Circuit Judge.

Consent of Dist. Judge.

I consent to the above order on condition that all contracts made for work, labor, and material are submitted to the court or judge or judges for approval.

March 3, 1880.

A. KREKEL, *Judge.*

161 *Answer of F. L. & T. Co. & Brooks & Hardy to the Petition to Borrow Money.*

Answer of Farmers' Loan & Trust Co. & Brooks & Hardy, trustees, &c., to the petition of Elijah Smith, receiver, for authority to borrow money, &c.

In the Circuit Court of the United States for the Western District of Missouri.

THE FARMERS' LOAN & TRUST COMPANY
vs.
THE BURLINGTON & SOUTHWESTERN RAILWAY COMPANY and Others.

Answer of the Farmers' Loan & Trust Co. to the petition of Elijah Smith, receiver, for authority to borrow $500,000, to be a first lien on that part of the railway south of Lexington, Missouri, acquired from the Lexington, Lake & Gulf Railroad Company.

And now come the said Farmers' Loan & Trust Company, by Grant & Grant, their solicitors, and in answer to the petition of the receiver in the above matter admit the propriety of the request therein made, and that it is important that said part of said branch road extending southwardly from Lexington over the line of what was formerly known as the Lexington, Lake & Gulf railroad should be completed and equipped at once, and they do hereby consent to and join in the request of said receiver for all the authority
162 prayed for in his petition, & that he be allowed to borrow $500,000 on his certificates, as therein requested.

GRANT & GRANT,
S'l's for F. L. & T. Co.

We also appear for John W. Brooks & Alpheus Hardy, trustees, and disclaim any interest whatever in the subject-matter of this suit.

GRANT & GRANT,
For Brooks & Hardy.

Consent of Bondholders.

Consent of certain bondholders to the order granting the receiver leave to borrow money, &c.

In the Circuit Court of the United States for the Western District of Missouri.

THE FARMERS' LOAN & TRUST CO.
vs.
THE BURLINGTON AND SOUTHWESTERN RAILWAY COMPANY & Others.

We, the undersigned, holders of the numbers of bonds secured by the mortgage to the complainants in the foregoing-entitled cause set opposite our names, do hereby give our consent to the order prayed for by the receiver for authority to issue five hundred thousand dollars ($500,000) of receiver's certificates, to be a first
163 lien on that part of the road lying south of Lexington, Missouri, and for other authority asked for in his petition and amended petition referred to in the order of the Hon'l. Geo. W. McCrary, made January 26th, 1880, at chambers, St. Louis, Missouri.

JAMES F. JOY,	fifty bonds.
JAMES F. JOY, *Trustee*,	seventy bonds.
MOSES TAYLOR,	one hundred & fifty bonds.
THO'S EMERY'S SONS,	fifty bonds.
CHARLES E. PERKINS,	149 bonds.

Consent of Bondholders.

In the Circuit Court of the United States for the Western District of Missouri. Equity.

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE BURLINGTON AND SOUTHWESTERN RAILWAY COMPANY and Others. } 297.

Consent of certain bondholders to order granting leave to receiver to borrow money, &c.

We, the undersigned, holders of the number and amount of bonds secured by the mortgage to the complainants in the fore-
164 going-entitled cause set opposite our names, do hereby give our consent to the order prayed for by the receiver for authority to issue five hundred thousand dollars ($500,000) of receiver's certificates, to be a first lien on that part of the road lying south of Lexington, Missouri, and for other authority asked for in his peti-

tion and amended petition referred to in the order of the Hon'l George W. McCrary, made January 26th, 1880, at chambers, St. Louis, Mo.:

	HENRY TAYLOR,	
	For Self and Others,	nineteen b'd-.
	EDWARD D. MANDELL,	twelve bonds.
	WM. I. ROTCH,	twenty-four.
	WARD M. PARKER,	twelve.
	J. W. BROOKS,	twenty-five.
	By J. HENRY BROOKS.	
	J'N DENISON,	twenty-six.
	B. SCHLESINGER,	twenty-nine.
	SEBASTIAN B. SCHLESINGER,	twenty-five.
	ESTATE OF EDWARD L. BAKER,	
	By FIN. S. POTTER, *Ex'r,*	six.
	JONATHAN BONNER,	twelve.
	HUNT & HATHAWAY,	twelve.
	OLIVER PRESCOTT,	seventeen.
	H. W. SUTER,	
	For Self and Others,	$10,000.
	E. R. WIGGINS	(fifty bonds), $50,000.
	R. S. GRANT,	eight bonds, $8,000.
165	THEO. DREWS,	seventeen bonds.
	WM. W. CRAPO,	twenty bonds.
	THOS. NICKERSON,	twenty-five bonds.
	I. T. BURR,	twenty-five bonds.
	EDWIN FUSSY,	thirty bonds.
	J. T. BAILEY,	twenty bonds.
	JOHN R. BREWER,	
	For Self and Others,	twenty-six bonds.
	HENRY SAYLER, *Trustee,*	thirty bonds.
	HENRY SAYLER, *Att'y,*	fifty bonds.
	P. W. SMITH,	eighty-seven bonds.
	HENRY W. DODD,	twenty bonds.
	D. L. QUIRK,	fifty-five bonds.
	S. A. KENT,	twenty-five bonds.
	J. B. LYON,	fifty bonds.
	ELIJAH SMITH.	

Order of Court Granting Receiver Authority to Borrow Money.

In the Circuit Court of the United States for the Western District of Missouri.

THE FARMERS' LOAN AND TRUST COMPANY OF NEW YORK
vs.
THE BURLINGTON AND SOUTHWESTERN RAILWAY COMPANY, THE LINNEUS BRANCH THEREOF.

Order of court granting receiver authority to borrow money, &c.

The application of Elijah Smith, the receiver heretofore ap-
166 pointed by this court, for authority to borrow money and

construct an unfinished portion of the railroad of defendant from Lexington southwardly, and for other authority, as appears in his petition and amended petition therefor, came on for hearing before the Hon. Geo. W. McCrary, circuit judge, at chambers, in the city of St. Louis, on the 26th day of January, 1880, and it appearing that the complainants and defendants in said cause had been duly notified of said application and have filed answers consenting to said order, and that it is proper that the same be granted as asked for in the petition and amended petition, it was therefore ordered by said circuit judge that the prayer of said receiver be granted upon his obtaining the written consent of two-thirds of the bondholders interested in said mortgage and the concurrence of the Hon. A. Krekel, one of the judges of this court; and now, on this 3rd day of March, 1880, said application coming on for further hearing before the Hon. A. Krekel, at his chambers, Jefferson city, and it appearing that said receiver has obtained in writing the consent of the requisite number of the holders of said bonds, it is
167 ordered and decreed that the authority prayed for by the receiver be granted, and the said Elijah Smith, receiver, is hereby authorized, empowered, and directed to proceed with the construction and completion of such part as to him may seem advisable of that portion of the road of said defendant acquired by contract with the Lexington, Lake and Gulf railroad, and lying south of Lexington, in the State of Missouri, and to equip and put the same in operation as soon as practicable.

And for such purpose the said receiver is hereby authorized and directed to borrow a sum of money not exceeding five hundred thousand dollars for a term of not exceeding five years and at a rate of interest not exceeding seven per centum per annum, such interest to be payable semi-annually, and to make the same payable in his discretion in the cities of Boston or New York or both, and to issue to the person or persons, company or companies, corporation or corporations, advancing said sum or sums of money his debentures or certificates, with interest coupons or warrants attached, signed by him, expressing the amounts advanced or loaned and the
168 terms thereof, which said debentures or certificates shall be in such form as said receiver may deem most convenient, but shall recite for what purpose they are issued and upon what property they are a lien, and before delivery shall be countersigned by the clerk of this court and the seal of the same annexed.

And it is further ordered, adjudged, and decreed that such certificates or debentures shall be and they are hereby adjudged to be a lien for the principal and interest thereof prior to all other liens or claims whatsoever upon that portion of said defendant's railroad before mentioned, with all of the property & appurtenances thereto belonging, to wit:

That portion of said road composed of what was formerly the Lexington, Lake and Gulf railroad and acquired by said defendant for its Linneus Branch by contract of date February 7th, 1872, and extending from Lexington southwardly through the counties of Cass, Bates, & Vernon, and to some point on the south boundary

line of the State to be determined upon, and upon all prop-
169 erty acquired and added thereto by any of the money bor-
rowed under this order, but upon no other property or funds in the possession of said receiver; and the said loan constitutes no personal obligation against the defendant except so far as to be of force as a first lien upon the before-mentioned property & to what extent any of the holders of said certificates in case of non-payment thereof may institute & prosecute suits against said defendants or its successors, assigns, to enforce said lien.

And the said receiver is further authorized and directed to purchase all necessary materials, to employ all necessary agents and servants, to purchase all necessary & unacquired rights of way & land for stations & other necessary purposes, to take donations and subscriptions from any and all persons and corporations willing to subscribe or give in aid of constructing said road, in his name as receiver or as trustee for his beneficiaries; to purchase all necessary engines, cars, and other equipment for the operation of said road, when sufficiently completed, and that he proceed to construct such portion thereof and commencing at such point on the line and ex-
170 tending to such other point as may by him be most advisable for the interests of the parties concerned.

It is further ordered that all contracts for work, labor, or material for the purpose aforesaid shall be presented to one of the judges of this court for approval.

It is further ordered that said receiver keep a separate account of all his doings and expenditures hereunder & of all earnings of said portion of said road herein mentioned, if any, and that he make regular reports thereof & file the same in this court for the inspection of the court and all parties concerned.

And the said receiver is further authorized and directed to settle and adjust, by payment or otherwise, any outstanding claims against the Lexington, Lake & Gulf Railroad Company which may seem to be prior in right to the claims of the Burlington & Southwestern Railway Company under the contract before mentioned, and to purchase in any outstanding or adverse lien or title to any portion or all of said property upon such terms as he may deem for the interest of the parties concerned, any right or title so acquired to be
171 conveyed to him as receiver for the benefit of the parties in interest herein.

A. KREKEL, *Judge.*

Report of Sale by Harry Lacey, Special Master.

In the Circuit Court of the United States for the Western District of Missouri, Eastern Division. In Equity.

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE BURLINGTON AND SOUTHWESTERN RAILWAY COMPANY and Others. } No. 297.

Report of sale by Henry Lacey, master in chancery.

To the hon. circuit court of the United States for the western district of Missouri:

In pursuance of a decree in the above-entitled cause, filed in the office of the clerk of the circuit court of the United States for the western district of Missouri on the 19th day of May, A. D. 1876, I, Harry Lacey, master in chancery of said court, do now respectfully report that, having given bonds in the penal sum of fifty thousand dollars ($50,000) for the faithful performance of my duties as such
172 master, and default having been made by the said defendants in the payment of the amount required to be paid by said decree within the time limited, I advertised the premises described in said decree for sale at public vendue between the hours of ten (10) o'clock a. m. and four (4) o'clock p. m. of the same day, and previously to said sale I advertised the time and place of holding the same, once each day four (4) successive weeks, by causing a notice containing the title of said cause, the names of the parties thereto, the name of the court wherein said cause was pending, and describing said premises, and stating I would sell the same, in pursuance of said decree, on the thirtieth (30th) day of November, A. D. 1880, between the hours of ten (10) o'clock a. m. and four (4) o'clock p. m. of that day, at the north door of the court-house in the town of Unionville, county of Putnam, State of Missouri, at public vendue to the highest and best bidder for cash or bonds, as provided in said decree, to be published four (4) successive weeks in the Boston Daily Advertiser, a newspaper printed and published every day, except Sundays, in the city of Boston, Massachusetts, and the Times, a newspaper printed and published every day, except
173 Sundays, in Kansas City, Missouri, which papers have a general circulation throughout the United States. The date of the Boston Daily Advertiser which contained the notice first was November second (2d), A. D. 1880, and the date of the last paper containing said notice was the thirtieth (30th) day of November, A. D. 1880. The date on which said notice was first inserted in the Times, of Kansas City, Missouri, was the first day of November, A. D. 1880, and the last paper containing said notice was dated the thirtieth day of November, A. D. 1880. A printed copy of each of said notices, together with the certificates of publication thereto attached to each, is hereto attached, marked Exhibits A & B, and made a part of this report.

On the 30th day of November, A. D. 1880, the day fixed for sale according to the terms of said notice, and at the hour of four (4) o'clock p. m., I attended at the place of sale mentioned in said notice, and then and there offered the premises described in said decree and notice, to wit, "all the real and personal property of said Burlington and Southwestern Railway Company in said Linneus Branch railroad owned at the date of said mortgage and since acquired in any manner appertaining to said branch, and all
174 the right, title, and equity of redemption therein, whether of said company or the stockholders thereof, in said branch or any premises leased therewith; all the branch railroad, including the premises leased named in said mortgage, extending from the main line of said Burlington and Southwestern Railway Company at or near Unionville, in the county of Putnam, in the State of Missouri, by the way of Linneus and Lexington to Kansas City, and by the line of the said leased premises from Lexington to Butler, in Bates county, Missouri, and to such other point in Southwestern Missouri as was determined upon by the board of directors of said company, or however said branch line of said railroad, including said leased premises, may be described or built, including the right of way therefor, road-beds, superstructure, iron, ties, chairs, splices, bolts, nuts, spikes, and all the lands and depot grounds, station-houses, depots, viaducts, bridges, timber, and materials and property purchased and to be purchased or otherwise acquired after the date of the mortgage for the construction and maintenance of said railroad, and all the engines, tenders, cars, and materials and machinery, and all kinds of rolling stock owned at the date of said mortgage or thereafter purchased
175 for or on account of said branch; all the revenues and income of said branch, and all the rights and privileges and franchises relating thereto and property acquired in virtue thereof, then in possession or thereafter acquired, including machine shops, tools, implements, personal property thereon or along the line of said branch railroad, together with all the property acquired by said Burlington and Southwestern Railway Company by virtue of its lease of said Lexington, Lake and Gulf railroad, and which branch line of said leased premises extending from Unionville by the way of Linneus to Kansas City and Southwestern Missouri is known as the Linneus Branch of the Burlington and Southwestern Railway Company, which premises sold were entirely in the State of Missouri, to the highest and best bidder; and said premises, being offered for sale at public auction, was then and there struck off and sold to Elijah Smith, of Boston, Massachusetts, for one million dollars ($1,000,000) in Linneus Branch bonds, said Smith being the highest and best bidder for said property

Said sale was made to said Smith as trustee and was without valuation or appraisement and subject to certain
176 receiver's certificates issued by Elijah Smith (by virtue of an order of said court), not to exceed in amount two hundred thousand dollars ($200,000).

Of the four thousand nine hundred and twelve (4,912) ties belonging to Warren McCullough and the three thousand eight hundred and fourteen (3,814) ties belonging to H. L. Thompson and McCullough & Beebe, and for which liens were established as against said Burlington and Southwestern Railway Company and said Farmers' Loan and Trust Company, trustee aforesaid, and which were ordered to be sold by said decree, all have been paid for by said receiver and vouchers taken for amount paid, which vouchers are hereto attached and made a part of this report, marked Exhibits C, D & E.

As to the twenty-one hundred and ninety-six (2,196) ties shown by said decree to have been furnished by Casperson & Combs, and for which a lien was established by said decree in their favor and against said railway company and said trustee, I was informed by Elijah Smith, receiver, and L. T. Hatfield, his attorney, that such finding by the court was a mistake, and that proceedings have been instituted in said court to set aside said judgment, and said
177 proceedings being before the same tribunal to which this report is made and said decree of foreclosure and sale under which this report is made not being final, reserving in specific terms the right to make further orders, the master did not think it advisable to offer to sell and did not do so.

Said master in chancery was informed by said receiver that there were no funds on hand at the date of said sale over and above the amount necessary to operate said railroad, and said receiver further reported that monthly statements of receipts and disbursements in connection with the operation of said railroad were filed in the office of the clerk of said court, all of which monthly statements have been passed upon and approved by one of the judges thereof.

I further report that the entire expense of advertising said sale was one hundred and thirty-five dollars ($135), bills for which were presented to Elijah Smith and, I am informed, were paid by him.

My individual expenses in connection with said sale are seventy-two and $\frac{85}{100}$ dollars ($72.85), and fee of five hundred dollars ($500) for selling under both decrees I request be taxed as part of the costs of this suit.

A deed from said master in chancery to said purchaser as
178 trustee is herewith submitted for approval.

All of which is respectfully submitted.

HARRY LACEY,
Special Master in Chancery.

STATE OF IOWA, } ss:
Scott County, }

I, Harry Lacey, being duly sworn, depose and say that I have read the foregoing report; that I am acquainted with the facts therein contained; that the same are true. HARRY LACEY.

Subscribed and sworn to by said Harry Lacey this 20 day of January, A. D. 1881.

[L. S.] WHITAKER M. GRANT,
Notary Public in and for Scott County.

"EXHIBIT A."

Ex. "A." Report of Sale.

Publishers' certificate.

STATE OF MASSACHUSETTS, *County of Suffolk:*

On this 4th day of December, A. D. 1880, personally appeared before the undersigned, a justice of the peace within and for said county and State, A. Ross, one of the publishers of the Boston Daily Advertiser, a daily newspaper published at Boston, county of Suffolk, in the State of Massachusetts, and who, being duly sworn, states on oath that the adv. master's sale Bur. & So'western Railway Co.,
179 Linneus Branch, a true copy of which is hereto annexed, was published in said newspaper in its issue of Nov. 2d, and daily 4 weeks, A. D. 1880, Sundays excepted.

A. ROSS.

Subscribed and sworn to before me this 4th day of December, 1880.

URIAH A. POLLARD,
Justice of the Peace.

Copy of Advertisement.

Master's sale.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Western District of Missouri. In Chancery.

THE FARMERS' LOAN AND TRUST CO.
vs.
THE BURLINGTON AND SOUTHWESTERN RAILWAY COMPANY and Others.

Notice is hereby given that in pursuance of a decree entered in the above-entitled cause in the said circuit court on the nineteenth day of May, A. D. 1876, I, Harry Lacey, the special master appointed by said decree, will, on Tuesday, the thirtieth day of November, A. D. 1880, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon of said day, at the north door of the court-house of Putnam county, in the town of Unionville,
180 State of Missouri, offer at public auction, to the highest bidder for cash (or such other means of payment as said master is authorized by said decree to receive) and upon the terms mentioned in said decree, all of the property therein mentioned, to wit: All of that certain railroad known as the Linneus Branch of the Burlington and Southwestern railway, with all of the property appertaining thereto, real and personal and mixed, including all property leased for and in behalf of said branch, and particularly what was formerly known as the Lexington, Lake and Gulf Railroad Company, with all the rights, privileges, and franchises thereof, and as

fully as the same is mentioned and described in said decree; and also twenty-one hundred and ninety-six cross-ties, upon which Coombs & Carperson claim a lien. Said sale, by order of said court, will be made without appraisement or redemption and subject to the rights that may exist in favor of the holders of certain certificates issued by Elijah Smith, receiver, under an order of this court as said rights may hereafter be determined.

HARRY LACEY,
Special Master.

"EXHIBIT B."

181 *Ex. "B." Report of Sale.*

Affidavit of publication.

M. Munford, of the city of Kansas, Mo., of lawful age, being duly sworn, says that he is one of the publishers of the Times, a newspaper published daily, tri-weekly, and weekly in the city of Kansas, Jackson county, Mo., and that the notice of the Farmers' Loan and Trust Co. *vs.* The Burlington and Southwestern Railway Company, a true copy of which is hereto attached, was duly published in the daily edition of said newspaper for the period of four weeks, commencing November 1, 1880, volume 20, number 124, and ending November 30, 1880, volume 21, number 153, as follows, inclusive.

M. MUNFORD.

Subscribed and sworn to before me this 3d day of December, 1880; and I certify that I was duly qualified as a notary public, and my term expires March 11th, 1883.

[L. S.]

C. J. BROWN,
Notary Public, Jackson Co., Mo.

Printer's fee	$12 00
Proof of publication	50
Total	$12 50

Received payment,

KANSAS CITY TIMES CO.
J. E. CAVEN.

Copy of Advertisement.

182 Master's sale.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Western District of Missouri.
In Chancery.

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE BURLINGTON & SOUTHWESTERN RAILWAY COMPANY and Others.

Notice is hereby given that in pursuance of a decree entered in the above-entitled cause in the said circuit court on the 19th day of

May, A. D. 1876, I, Harry Lacy, the special master appointed by said decree, will, on Tuesday, the 30th day of November, A. D. 1880, between the hours of 10 o'clock in the forenoon and 4 o'clock in the afternoon of said day, at the north door of the court-house of Putnam county, in the town of Unionville, State of Missouri, offer at public auction, to the highest bidder for cash (or such other means of payment as said master is authorized by said decree to receive) and upon the terms mentioned in said decree, all of the property therein mentioned, to wit: All of that certain railroad known as the Linneus Branch of the Burlington & Southwestern railway, with all of the property appertaining thereto, real and personal and mixed, including all property leased for and in behalf of said branch, and particularly what was formerly known as the Lexington,
183 Lake & Gulf Railroad Company, with all the rights, privileges, and franchises thereof, and as fully as the same is mentioned and described in said decree; and also 2,196 cross-ties, upon which Combs and Casperson claim a lien. Said sale, by order of said court, will be made without appraisement or redemption and subject to the rights that may exist in favor of the holders of certain certificates issued by Elijah Smith, receiver, under an order of this court as said rights may hereafter be determined.

HARRY LACEY,
Special Master in Chancery,
U. S. C. C., Western District of Missouri.

"EXHIBIT C."

Ex. "C." Report of Sale.

MILAN, MO., *Nov. 7th*, 1879.

Received of Elijah Smith, receiver of the Burlington and Southwestern Railway Company, fifteen hundred and fifty & $\frac{30}{100}$ dollars, being in full payment of my lien granted by the circuit court of the United States for the western district of Missouri, at the April term thereof, 1876, and on the 19th day of May of said year, against the property of said company for three thousand eight hundred
184 and fourteen sawed bridge ties, said lien having been allowed in the decree of foreclosure in the case of the Farmers' Loan and Trust Company against The Burlington & Southwestern railway *et al.*, in equity, No. 297, said Smith to pay the costs of suit.

H. L. THOMPSON.

Witness:
L. T. HATFIELD.

"EXHIBIT D."

Ex. "D." Report of Sale.

MILAN, MO., *Nov. 12th*, 1879.

Received of Elijah Smith, receiver of the Burlington and Southwestern Railway Company, seventeen hundred and nineteen & $\frac{70}{100}$ dollars, being in full payment of my lien granted by the circuit

court of the United States for the western district of Missouri, at the April term thereof, 1876, and on the 19th day of May of said year, against the property of said company for four thousand nine hundred and twelve ties furnished said company, said lien having been allowed in the decree of foreclosure in the case of the farmers Loan and Trust Company against The Burlington & Southwestern Railway Company *et al.*, in equity, No. 297, said Smith to pay all costs.

W. McCULLOUGH.

Witness:
L. T. HATFIELD.

185 "EXHIBIT E."

Ex. "E." Report of Sale.

Burlington & Southwestern Railway Co., Elijah Smith, receiver, to McCulloch & Beebe, of Milan, Mo., Dr., Aug., 1877, as per order of court & agreement attached hereto.

Received August 11th, 1877, of Elijah Smith, receiver of the Burlington & Southwestern Railway Co., the sum of four hundred and three & $\frac{75}{100}$ dollars, ($403.75) in full for the above account.

McCULLOCH & BEEBE,
By JNO. P. BUTLER,
Att'y & Assignee.

Approved.
ELIJAH SMITH, *Rec'r.*

Master's Deed.

This indenture, made this 13th day of December, A. D. 1880, between Harry Lacey, master in chancery of the circuit court of the United States for the western district of Missouri, party of the first part, and Elijah Smith, trustee, of Boston, Massachusetts, party of the second part, witnesseth:

Whereas in pursuance of a decree entered on the nineteenth (19) day of May, A. D. 1876, by the circuit court of the United States for the western district of Missouri, in a certain case then pend-
186 ing therein, on the chancery side thereof, wherein The Farmers' Loan and Trust Company was complainant and The Burlington and Southwestern Railway Company and others were defendants, the said master in chancery duly advertised, according to law and the direction of said decree, the premises hereinafter described for sale at public auction to the highest and best bidder, at Unionville, in Putnam county, Missouri, at the north door of the court-house, between the hours of ten (10) o'clock a. m. and four (4) o'clock p. m., on the thirtieth (30th) day of November, A. D. 1880;

And whereas at the time and place so as aforesaid appointed for said sale the said master in chancery attended to make the same and offered and exposed said premises for sale at public auction to the highest and best bidder, and thereupon Elijah Smith, trustee, offered

and bid therefor the sum of one million dollars ($1,000.000) in Linneus Branch bonds, and that being the highest bid offered said master in chancery accordingly struck off and sold to said Elijah Smith, trustee, for said sum of bonds the said premises;

And whereas said premises have not been redeemed from said sale: Now, therefore, in consideration of the premises, the said party of the first part doth hereby convey unto the said party of the second
187 part, his heirs and assigns, the said premises, which are situated in the State of Missouri and described as follows, to wit: "All the real and personal property of said Burlington and Southwestern Railway Company in said Linneus Branch railroad owned at the date of said mortgage and since acquired in any manner appertaining to said branch, and all the right, title, and equity of redemption therein, whether of said company or the stockholders thereof in said branch or any premises leased therewith; all the branch railroad, including the premises leased, named in said mortgage, extending from the main line of said Burlington and Southwestern Railway Company at or near Unionville, in the county of Putnam, State of Missouri, by the way of Linneus and Lexington to Kansas City, and by the line of the said leased premises from Lexington to Butler, in Bates county, Missouri, and to such other point in Southwestern Missouri as was determined upon by the board of directors of said company or however said branch line of said railroad, including said leased premises, may be described or built, including the right of way therefor, road-bed, superstructure, iron, ties, chairs, splices, bolts, nuts, spikes, and all the lands and depot grounds, station-houses, depots, viaducts, bridges,
188 timber, and material and property purchased and to be purchased or otherwise acquired after the date of mortgage for the construction and maintenance of said railroad, and all the engines, tenders, cars, and materials and machinery, and all kinds of rolling stock owned at the date of said mortgage or thereafter purchased for or on account of said branch, and all rights and privileges and franchises relating thereto and property acquired in virtue thereof then in possession or thereafter acquired, including machine-shops, tools, implements, personal property thereon or along the line of said branch railroad, together with all the property acquired by said Burlington and Southwestern Railway Company by virtue of its lease of said Lexington, Lake and Gulf railroad, and which branch line of said leased line and premises extending from Unionville by the way of Linneus to Kansas City and Southwestern Missouri is known and designated as the Linneus Branch of *of* the Burlington & Southwestern railway:"

To have and to hold the same, with all the appurtenances thereunto belonging, unto said party of the second part, his heirs and assigns, forever.

189 Witness the hand and seal of said party of the first part the day year first above written.

HARRY LACEY,
Master in Chancery.

STATE OF IOWA, } ss:
County of Scott, }

I, Witaker M. Grant, a notary public in and for said Scott county, in the State aforesaid, do hereby certify that Harry Lacey, master in chancery of said United States circuit court for the western district of Missouri, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument as his free and voluntary act, as such master in chancery, for the uses and purposes therein set forth.

Given under my hand and seal notarial this twenty-fourth day January, A. D. 1881.

[L. S.] WITAKER M. GRANT,
Notary Public in and for Scott County, Iowa.

UNITED STATES OF AMERICA, } sct:
Western District of Missouri, Eastern Division, }

I, Henry C. Geisberg, clerk of the circuit court of the
190 United States in and for said district, do hereby certify that the foregoing writing is a true copy of the master's deed of H. Lacey, master in chancery, to Elijah Smith, trustee, filed Feb. 26, 1881, in case No. 297, of Farmers' Loan and Trust Company *vs.* The Burlington & Southwestern Railway Co. *et al.* as fully as the same remains on file and of record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of Jefferson, in said district, this 26th day of August, A. D. 1882.

[L. S.] H. C. GEISBERG, *Clerk.*

Decree Confirming Sale.

Decree confirming report of sale, &c.

In the Circuit Court of the United States for the Western District of Missouri, Eastern Division. In Equity.

THE FARMERS' LOAN & TRUST COMPANY, Trustees,
vs.
THE BURLINGTON & SOUTHWESTERN RAILWAY COMPANY and Others. } No. 297.

Decree.

TUESDAY, *July 5th*, 1881.

And now, on this day, this cause came on to be heard upon
191 the motion of the complainants for a confirmation of the report of Henry Lacey, special master appointed to sell the property mentioned and described in the decree of foreclosure herein, and the sale of said property made and reported by said special master; and it appearing to the court that said report of said

master has been on file more than one month, and that neither of the parties has filed any exceptions thereto, and that said special master has proceeded in pursuance of the order and decree of this court, and that he has sold the property of the Burlington & Southwestern Railway Company, known as the Linneus Branch of said company's railway, with all of its rights, privileges, and franchises, as in said decree authorized and directed, to Elijah Smith, trustee, and has in due form executed a deed therefor to said purchaser, and which deed is now submitted to the court for approval, and the court being fully advised in the premises—

It is ordered, adjudged, and decreed by the court that the doings of said master, as appear by his said report and the sale and deed made by him of the property and rights and franchises of the Burlington & Southwestern Railway Company pertaining to the said Linneus Branch, as described in the decree of foreclosure, be,
192 and the same are hereby, ratified, confirmed, and approved by the court and said deed ordered to be delivered to said Elijah Smith, trustee, and that the property therein described be delivered to and placed in the possession of said Elijah Smith, trustee.

But the said deed of conveyance and the delivery of said property to said grantee shall not be taken to affect any claim, right, interest in or lien upon or to said property sold and conveyed by said master's deed now pending in this court or in any State court by leave of this court, but that said claim, right, interest, or lien are hereby reserved, subject to further order and decrees of this court, and the power to make further orders, decrees, and directions in reference to said property in this cause is hereby expressly reserved by the court.

GEO. W. McCRARY,
Circuit Judge.

Agreement between H. L. Newman & E. Smith, Rec'r.

Agreement between Henry L. Newman and Elijah Smith, receiver, &c., attached to quitclaim deed of Newman and others to Smith, rec.

This agreement, made and entered into this 12th day of March, 1880, by and between Elijah Smith, as receiver of the Burlington & Southwestern Railway Company, acting under authority of
193 the circuit court of the United States in and for the western district of Missouri, in a certain suit therein pending in chancery, wherein "The Farmers' Loan and Trust Company of New York" is plaintiff and said Burlington and Southwestern Railway Company and others are defendants, party of the first part, and Henry L. Newman, as trustee for himself and John W. Waddell, party of the second part, witnesseth: That, in consideration of the covenants and agreements on the part of the first party hereinafter named, said party of the second part covenants and agrees to convey to said party of the first part, as said receiver, by quitclaim deed and not otherwise, all the right, title, and interest now held by him or

vested in him, said party of the second part, in and to the railroad and property, appurtenances, and franchises of what was formerly known as the Lexington, Lake & Gulf railroad, extending southwardly from the Missouri river at Lexington, Missouri, by the way of Pleasant Hill, to a point south of Butler, in Bates county, Missouri, said deed to be made within twenty days from the date hereof and be placed in the hands of John W. Noble, of the city of St. Louis, Missouri, in escrow, and to be delivered by said Noble to said party of the first part upon the compliance with the terms of this
194 agreement on the part of said receiver, and which said deed shall be executed by said party of the second part and his wife and also by said John W. Waddell and his wife, and said conveyance shall include all the rights and interest acquired by said Newman and Waddell under a certain trust deed made by the Lexington, Lake & Gulf Railroad Company, of date January 16th, 1872, to Moses Chapman, trustee, and the sale thereunder by said trustee, of date February 20th, 1877, except as hereinafter provided, and a release of all claims and demands of said Newman and Waddell of every kind against said Lexington, Lake & Gulf Railroad Company, so as to substitute said receiver to the same rights as are now held by either said Newman, as trustee, or said Waddell, or in any other manner.

And in consideration of the premises the said party of the first part agrees, as receiver as aforesaid, to pay to said Newman out of the money coming into his hands from that part of said railroad hereinbefore mentioned or from the sale of receiver's certificates lately authorized by said court to be issued by said receiver, or from any earnings from that portion of said road or arising from the sale thereof under the decree of said court, and within nine months
195 from the eighteenth day of December, 1879, the sum of seventeen thousand seven hundred and fifty dollars, it being recognized and admitted in this settlement that the claim of said Newman to the above amount is a first and prior lien upon said portion of said railroad, paramount to the mortgage to said Farmers' Loan & Trust Company; but this agreement is not to bind the receiver in reference to any other property or money coming into his hands, except from or pertaining to that part of the property aforesaid acquired from the Lexington, Lake & Gulf Railroad Company.

And it is further agreed that the fulfillment of this agreement by both parties shall constitute a full settlement of all matters and differences between said parties hereto, as well as of all rights and liabilities of said Newman and Waddell in and to or on account of any property of said Lexington, Lake & Gulf Railroad Company, or connected with said roads, and of any demand, right, or claim of said first party or said Lexington, Lake & Gulf Railroad Company against said second party, for himself or said Waddell or either of them for any ties, iron, or other property moved or disposed of by said Newman or Waddell or others associated with them or acting
196 under their authority or direction; but this is not to be so construed as to bar the right of the receiver to assert any title to any of said property now held by other persons than those herein

named by virtue of the rights acquired by him through the mortgage to the Farmers' Loan & Trust Company.

And it is further mutually agreed by and between the parties hereto that time is of the essence of this contract, and that in case said second party shall fail to comply on his part with the stipulations hereof said first party may have the right to have the same enforced specifically by the court in which said cause is pending or, at his option, declare this agreement absolutely null and void; and if said first party shall fail within said nine months from December 18th, 1879, to pay said $17,750.00 said second party may apply to said court for the enforcement thereof or, at his option, he may abrogate or abandon the same absolutely, and his rights in that event shall be the same as if this contract had not been made.

And it is distinctly understood that this agreement is made by said receiver under an order of said court, and refers to no other than said property before mentioned, and is to be paid
197 out of no funds except such as arise from said portion of said road, and is to constitute no personal or individual claim against said Elijah Smith.

It is further understood and agreed that when said quitclaim deed shall be delivered in escrow to said Noble that the note mentioned and described in the said trust deed to Moses Chapman, under which said Newman's claim arises, shall be delivered to said Noble also in escrow, and said trust deed shall also be delivered to him if in possession of parties, if not, as soon as practicable; and on the compliance of the receiver with his part of this agreement said note and said trust deed shall be delivered to him, with the said quitclaim deed, as muniments of his title and as vouchers, said note to be cancelled upon payment of said $17,750.00.

Said Newman represents that he has not made, nor said Waddell, nor any person acting under their authority, any disposition of the grade or right of way purchased under said deed of trust, except about three miles in La Fayette Co., Mo., to the Kansas City, St. Louis & Chicago Railway Company, now operated by the Chicago & Alton Railroad Company.

198 In testimony whereof the said parties have hereunto, and to a duplicate hereof, set their hands and seals this the day and year first above mentioned.

ELIJAH SMITH,
Rec'r of the Burlington & Southwestern R'way Co., Linneus Branch.
HENRY L. NEWMAN, [L. S.]
Trustee for Himself & Jno. W. Waddell.

Attest: TILTON DAVIS.

Deed of Newman & Others to E. Smith, Rec'r.

Quitclaim deed of Henry L. Newman and others to Elijah Smith, receiver, &c.

This deed, made and entered into this twenty-ninth day of March, eighteen hundred and eighty, by and between Henry L. Newman,

trustee for himself & John W. Waddell, & Sarah E., wife of said Henry L. Newman, of the city of St. Louis, Mo., & John W. Wadell & Elizabeth N. Waddell, his wife, of La Fayette county and State aforesaid, party of the first part, and Elijah Smith, receiver of the Burlington & Southwestern Railway Company, in a certain suit in the United States court for the western district of Missouri, at Jefferson City, wherein the Farmers' Loan & Trust Co. is plaintiff and said railway company & others are defendants, party of the second part, witnesseth:

199 That the said party of the first part, in consideration of seventeen thousand seven hundred and fifty dollars to them paid by the said party of the second part, the receipt of which is hereby acknowledged, do by these presents remise, release, and forever quitclaim unto the said party of the second part all the right, title, interest, & claim of said party of the first part of, in, & to the road of the Lexington, Lake & Gulf Railroad Company as the same is now surveyed & constructed, & extending from the city of Lexington, in La Fayette Co., Missouri, to & below the town of Butler, in Bates county, in said State, a distance of about *nine* miles, together with all & singular the right of way for said road belonging to or acquired by said Co., & also the right of said Co. to construct said road, as well as all other rights belonging to said Co. & appertaining to said railroad now owned and possessed by said first party; also all bonds & real estate to which said company may become entitled by reason of the construction of said road, together with all & singular the rights, privileges, & corporate property & franchises, including the road-bed, made or to be made, track, depot grounds, fences, bridges, ties, properties, & all other matters, materials, & things appertaining to said company & now vested in said first party, to the full extent, as

200 set forth in a certain deed of trust executed by said Co. to one Moses Chapman, dated Jan'y 16, 1872, & recorded the 22nd day of February, 1872, in the recorder's office for La Fayette county, Missouri, in book No 9, at page 223, aforesaid, & also as set forth in a certain deed of sale pursuant to the terms of said trust made by said Chapman, trustee, to said Henry L. Newman, trustee, dated February 20, 1879, and to the extent & with all the obligations, limitations, rights, restrictions, stipulations, and exceptions as contained in a certain agreement made March 12, 1880, between said Newman & said party of the second part, and which said agreement is herewith attached & made part of this deed, and this deed being made in pursuance of said agreement and in compliance therewith:

To have and to hold the same, together with all the rights, immunities, privileges, and appurtenances to the same belonging, to the said party of the second part and to his successors and assigns forever, as in said agreement provided.

In witness whereof the said party of the first part have hereunto set their hands and seals the day and year first above written.

HENRY L. NEWMAN. [L. S.]

201 SARAH E. NEWMAN. [L. S.]

JNO. W. WADDELL. [L. S.]

ELIZABETH R. WADDELL. [L. S.]

Executed in the presence of—
[L. S.] ANTHONY MILTENBERGER,
Notary Public, City of St. Louis, Mo.

STATE OF MISSOURI, } ss:
County of La Fayette, }

Be it remembered that on this 31st day of March, A. D. eighteen hundred and eighty, before me, the undersigned, a notary public in and for the county aforesaid, came John W. Waddell and Elizabeth R. Waddell, his wife, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing as party thereto, and they acknowledged the same to be their act and deed for the purposes therein mentioned. And the said Elizabeth R. Waddell, being by me made acquainted with the contents of said deed, acknowledged, on an examination apart from her said husband, that she executed the same freely & without compulsion or undue influence of her said husband.

My commiss. expires Dec. 10, 1880.

Given under my hand & notarial seal, at my office, in Lexington, in the said county, this 31st day of March, A. D. 1880.

[L. S.] (Signed) WM. H. CHILES,
Notary Public.

202 STATE OF MISSOURI, } ss:
City of St. Louis, }

Be it remembered that on this 1st day of April, A. D. eighteen hundred and eighty, before me, the undersigned, a notary public in and for the city aforesaid, came Henry L. Newman and Sarah E. Newman, his wife, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing as party thereto, & they acknowledged the same to be their act and deed for the purposes therein mentioned. And the said Sarah E. Newman, being by me made acquainted with the contents of said deed, acknowledged, on an examination apart from her said husband, that she executed the same freely & without compulsion or undue influence of her said husband.

Given under my hand & notarial seal, at St. Louis, Mo., this 1st day of April, 1880.

[L. S.] ANTHONY MILTENBERGER, JR.,
Notary Public, of St. Louis, Mo.

Commission expires Dec. 20th, 1881.

(NOTE BY THE CLERK.—" The contract referred to in this deed and attached thereto is copied on page 192 of this transcript.")

Note of L., L. & G. R. R. to Monroe & Co.

Note of the Lexington, Lake & Gulf R. R. Co. to Monroe & Co. for $10,682.74.

$10,682.74. LEXINGTON, Mo., *Oct. 12th*, 1871.

One day after date the Lexington, Lake & Gulf Railroad Co promises to pay Monroe and Company ten thousand six hundred & eighty-two $\frac{74}{100}$ dollars, for value received, negotiable and payable, without defalcation or discount, with interest from *due*, at the rate of ten per cent. per annum.

LEXINGTON, LAKE & GULF R. R. CO.
By the president, JNO. REID.

[$5.35 U. S. revenue stamps, cancelled.]

Endorsed: Monroe & Co. Received on the within note five thousand dollars, of Mr. Chapman, trustee. H. L. Newman.

Deed of Trust L., L. & G. — to Chapman, Trustee.

Deed of trust of the Lexington, Lake & Gulf R. R. Co. to Moses Chapman, trustee, to secure note of $10,682.74.

This indenture, made the seventeenth day of January, A. D. 1872, between the Lexington, Lake & Gulf Railroad Company, a
204 corporation duly incorporated & existing under the laws of the State of Missouri, party of the first part; Moses Chapman, of the county of La Fayette and State of Missouri, party of the second part, and Henry L. Newman, of the city of Leavenworth and State of Kansas, and John W. Waddell, of La Fayette county, Missouri, party of the second part, witnesseth:

Whereas the party of the first part own and possess the power by the laws of the State of Missouri to construct, maintain, and operate a railroad in the said State from the city of Lexington, in the State of Missouri, to the south boundary line of the said State of Missouri, and of which said line and distance the said party of the first part has already constructed the road-bed of said railroad from said city of Lexington to the town of Butler, in the county of Bates, and ties furnished thereon sufficient to about tie that part of said road between the city of Lexington and the city of Pleasant Hill thereon, besides and including the bridging thereon; and whereas said party of the first part are indebted for and stand in need of money to pay for the construction of said road-bed and materials furnished thereon, and were, on the completion of said work, indebted
205 to Monroe & Co., contractors thereon, in the sum of ten thousand six hundred and eighty-two & $\frac{74}{100}$ dollars, evidenced by the promissory note of said party of the first part for that sum, executed by said party of the first part, dated October 12th, A. D. 1871, one day after date, with interest from *due* at the rate of ten

per cent. per annum, and which said note is still due and unpaid by said party of the first part, and said note being given for said work, and also said party of the first part was, on the completion of said work, also indebted to and owing one Lawrence Dean, contractor thereon, in the sum of two thousand dollars, evidenced by the promissory note of said party of the first part for that sum, executed by said party of the first part, dated October 12th, A. D. 1871, one day after date, with interest from date at the rate of ten per cent. per annum, and which said note is still due & unpaid, and amounting in the aggregate to the sum of twelve thousand six hundred and eighty-two and $\frac{74}{100}$ dollars, and both being for debts contracted by said railroad company for the completion & finishing and construction of said railroad of said party of the first part: Now, therefore, in order to secure the payment of said two notes, and in consideration of the premises and of the sum of one dollar paid to
206 the said party of the first part (the receipt whereof is hereby acknowledged), the said Lexington, Lake & Gulf Railroad Company, by virtue of law and under and in pursuance of the orders of the board of directors thereof heretofore had and done, have granted, bargained, sold, conveyed, and confirmed, and by these presents do grant, bargain, sell, convey, and confirm, unto the said Moses Chapman, party of the second part, his representative or successor in trust, and for the uses and trusts hereby created, all and singular the said road of the said party of the first part as the same is now surveyed, constructed, and being constructed, and leading from the said city of Lexington to said town of Butler, in the State of Missouri, a distance of about eighty-one miles, together with all and singular the right of way for said road belonging to or acquired by the said party of the first part, and also the right of the said party of the first part to construct and maintain along said route and from said city of Lexington to the south boundary line of said State a railroad, as well as all other rights, privileges, and franchises belonging to the said party of the first part in, upon, or pertaining to said railroad, including its road-bed, made or to be made,
207 its track laid or to be laid, depot, grounds, rails, fences, bridges, ties, and all other buildings, materials, properties, or things, as well as all other property appertaining to said railroad now owned or possessed or acquired, or hereafter to be owned, possessed, or acquired, and all lands and real estate to which said party of the first part may become entitled through or by reason of the construction of said railroad, together with all & singular the rights, privileges, and corporate property and franchises of said railroad company and all the appurtenances to the above-described property belonging or in anywise appertaining:

To have and to hold the said granted premises unto the said party of the second part, his successor or legal representative, forever, in trust, nevertheless, and for the uses and purposes in this indenture expressed—that is to say:

Whereas the said Lexington, Lake & Gulf Railroad Company did, on the 12th day of October, A. D. 1871, make and deliver its

two certain promissory notes, in words & figures as follows, one of which is as follows, to wit:

"$10,682.74. LEXINGTON, Mo., *Oct.* 12*th*, 1871.

"One day after date the Lexington, Lake & Gulf Railroad
208 Co. promise to pay Monroe and Company, or order, ten thousand six hundred and eighty-two & $\frac{74}{100}$ dollars, for value received, negotiable and payable, without defalcation or discount, with interest from *due* at the rate of ten per cent. per annum.

(Signed) "LEXINGTON, LAKE & GULF R. R. CO.,
"By JOHN REID, *the President.*"

Stamps, $5.35.

Endorsed on the back thereof by said Monroe & Co. to Henry L. Newman.

And the other of which is as follows, to wit:

$2,000.00. LEXINGTON, Mo., *Oct.* 12*th*, 1871.

One day after date, for value received, the Lexington, Lake & Gulf Railroad Co. promise to pay Lawrence Dean, or order, two thousand dollars, negotiable and payable, without defalcation or discount, with interest from date, at the rate of ten per cent. per annum.

(Signed) LEXINGTON, LAKE & GULF
RAILROAD COMPANY,
By JOHN REID, *the President.*

Stamps, $1.00.

Endorsed on the back thereof by said Lawrence Dean to John W. Waddell.

Now, if the said Lexington, Lake & Gulf Railroad Company, its assigns or successors, shall pay the respective sums of money
209 specified in said notes, with all interest that may be due thereon *or* or before the first day of March, A. D. 1872, then this indenture and deed of conveyance shall be void, and the said property and mortgaged lands, premises, rights, and franchises hereinbefore conveyed shall be released as the expense of the said party of the first part; otherwise the same shall remain in full force, and in case of default or failure of said party of the first part to pay off and discharge said two notes herein described and all interest thereon within and by the time hereinbefore mentioned, then it shall be lawful for the said Moses Chapman, trustee as aforesaid, his representative, representatives, successor, successors, or assigns, upon the written request of said party of the third part or either one of them, their representatives or assigns, to proceed to sell the said mortgaged premises and all and singular the said premises, property, and franchises so conveyed and herein described in entirety, and upon such written request said trustee, his representative or successor as aforesaid, shall cause the said premises, real and personal estate, rights,

and franchises to be sold at public auction, at the court-house door in the city of Lexington, county of La Fayette and State of Missouri, for cash, first giving at least thirty days' notice of said sale
210 by publishing the same in some newspaper published in the said county of La Fayette, in the State of Missouri, and on such sale to make, execute, and deliver to the purchaser or purchasers thereof a good and sufficient deed in fee simple for the same, which shall be a bar against the party of the first part, its successors and assigns, and all persons claiming or to claim under it or them, of all rights, interest, or claims of, in, or to the said premises, lands, property, rights, or franchises herein described or any part thereof.

And the said party of the second part, after deducting from the proceeds of the sale the costs and expenses thereof, shall apply so much of the proceeds as may be necessary to the payment of said principal and interest due and still unpaid on said two promissory notes or either one of them, and shall pay the remainder of said proceeds to the said party of the first part, its successors or assigns.

And in the event of such sale and having so purchased said premises, the purchaser or purchasers thereof shall have the right to take possession of all and singular the said premises, property, and franchises so conveyed, and to have, use, own, and enjoy the same in such manner as shall seem fit and proper in the premises, and to
211 that end and for the purpose of completing said railroad and operating same the said purchaser or purchasers as aforesaid may at any time take such lawful measures as he or they or his or their successors or assigns shall deem for their interest and to organize a new company or corporation, and which said new company or corporation shall be organized upon such terms, conditions, and limitations and in such manner as the parties then in interest may deem best, and thereupon to reconvey the premises and property so purchased by him or them to said new company or corporation.

And the said trustee, Moses Chapman, covenants to and with the said party of the first and second part-, severally, faithfully to perform & fulfil the trust herein created.

In witness whereof the said Lexington, Lake & Gulf Railroad Company, by order of its board of directors, have hereunto affixed its corporate seal and caused the same to be signed by its president & secretary, and the said trustee has hereto set his hand and seal the day and year first above written.

[L. S.] JOHN REID,
President Lexington, Lake & Gulf Railroad Company.
GREEN D. SATTERFIELD,
212 *Secretary Lexington, Lake & Gulf Railroad Company.*
M. CHAPMAN. [SEAL.]

STATE OF MISSOURI, } ss:
County of La Fayette, }

Be it remembered that on this 16th day of January, in the year one thousand eight hundred and seventy-two, before me, the undersigned, John E. Arnold, a notary public within and for said county of La Fayette and State of Missouri, and duly authorized by law to

take acknowledgments of deeds, mortgages, &c., personally appeared John Reid, who is to me personally known to be the same person whose name is subscribed to the foregoing and annexed instrument of writing as president of the Lexington, Lake & Gulf Railroad Company, and the said John Reid acknowledged the said instrument to be the act and deed of said railroad company, and that he executed the said deed and instrument of writing as and for the act and deed of the said Lexington, Lake & Gulf Railroad Company for the uses and purposes mentioned in said instrument.

In witness whereof I have hereunto set my hand & affixed my official seal the day and year last above written.

[L. S.] JNO. E. ARNOLD,

213 *Notary Public.*

STATE OF MISSOURI, } ss:
County of La Fayette, }

Be it remembered that on this 18th day of January, in the year eighteen hundred and seventy-two, before me, John E. Arnold, a notary public within and for said county and State, and duly authorized by law to take acknowledgement- of deeds, &c., personally appeared Green D. Satterfield, who is well known to me to be the same person whose name is subscribed to the foregoing instrument in writing as secretary of the Lexington, Lake and Gulf Railroad Company, and the said Green D. Saterfield acknowledged that he executed the said deed as & for the act & deed of the Lexington, Lake & Gulf Railroad Company for the uses & purposes therein mentioned.

In witness whereof I have hereunto set my hand & affixed my official seal the day & year last above written.

[L. S.] JNO. E. ARNOLD,
Notary Public.

STATE OF MISSOURI, } ss:
County of Bates, }

IN THE RECORDER'S OFFICE.

I, S. H. Geisel, recorder of deeds within and for the county
214 aforesaid, do certify that the instrument of writing hereto attached with the — thereon was filed for record in said office on the 16th day of March, 1874, at 4 o'clock and — minutes p. m., and that the same is duly recorded in said office in book seven for recording deeds of trust, at page 536.

In witness whereof I have hereunto set my hand and affixed the seal of my office.

Done at office, at Butler, this 25th day of March, 1874.

[L. S.] S. H. GEISEL, *Recorder.*

STATE OF MISSOURI, } ss:
County of La Fayette, }

I, Wm. Hixon, recorder of deeds for La Fayette county, Missouri, certify that the foregoing instrument of writing was filed in my

office for record at — a. m., 2.50 p. m., on the 21 day of February, 1872, and was by me duly recorded in book No. 9, page 223, &c.

Witness my hand and official seal the day and year aforesaid.

WM. HIXON, *Recorder*,
By JNO. H. CURRIE,
Dep. Recorder.

Deposition of J. W. Noble.

Deposition of John W. Noble on the part of Henry L. Newman, trustee.

215 Interrogatory No. 1. State your name, place of residence, & whether or not you know any of the parties to this controversy; also your occupation & age.

Answer. My name is John W. Noble; aged fifty; occupation, a lawyer; residence, St. Louis, Mo., & am personally acquainted with Henry L. Newman & know of the corporations named; am also acquainted personally with Elijah Smith, representing himself to be receiver, as stated in the case. I am not, to my knowledge, acquainted with John W. Waddell or his wife.

Interrogatory No. 2. State whether or not you know of any transaction between said Henry L. Newman, trustee, & said Elijah Smith, receiver, relating to the purchase by said receiver of said Newman of the interest of said Newman in what was known as the Lexington, Lake & Gulf railroad property or *or* any contract made between said parties relative thereto.

Answer. I do. Mr. Newman came with Mr. Smith & his lawyer, Mr. Smythe, to my office, in St. Louis, some time prior to March 12th, 1880, for the purpose of having me act as attorney for Mr. Newman in preparing an agreement in writing between Mr. Smith, as receiver, & Mr. Newman, as trustee for himself & Jno.
216 W. Waddel; the subject was fully explained to me by Mr. Newman & Mr. Smythe, the attorney, & the negotiations were participated in personally by Mr. Smith, as reciver, who seemed very desirous to have Mr. Newman enter into the agreement; he exhibited this mostly by asserting that he would use his personal influence to have the agreement carried out fully by the court. Mr. Smythe, the attorney, also joined in these representations & said there would be no difficulty; these statements were made in response to my suggestions as attorney for Mr. Newman; that it might be difficult to hold Mr. Smith, as receiver, unless the court fully authorized his action; the negotiations resulted in a written agreement, dated March 12, 1880, by & between Elijah Smith, as receiver of the "Burlington & Southwestern Railway Co.," and Henry L. Newman, trustee for himself & Jno. W. Waddell; an original of this agreement, purporting to be signed by Elijah Smith, receiver, &c., & to my knowledge signed by Henry L. Newman, trustee for himself & Jno. W. Waddell, is now in my possession & a copy of which is hereby attached to this my deposition, as I hold the original with a deed hereinafter mentioned pursuant to the terms of the
217 agreement itself; this agreement was delivered to Mr. New-

man upon its execution by the parties & by him (Mr. Newman) brought to me at the time of its date, or thereabout.

Interrogatory No. 3. State what was done in pursuance of the written agreement of which you have just spoken.

Answer. On the first of April, 1880, Mr. Newman brought to me a quitclaim deed dated the 29th March, 1880, a true copy whereof is hereto annexed, with its acknowledgments thereto attached, & to which is also attached an original of the agreement of March 12, 1880, & which deed is by and between Henry L. Newman, trustee for himself & Jno. W. Waddell, & Sarah P., wife of said Henry L., Newman, of the city of St. Louis, Mo., and Jno. W. Waddell & Elizabeth R. Waddell, his wife, of La Fayette county & State aforesaid, parties of the first part, and Elijah Smith, receiver of the Burlington & Southwestern Railway Co., in a certain suit in the United States court for the western district of Missouri, at Jefferson City, wherein the Farmers' Loan & Trust Co. is plaintiff & said railway Co. & others are defendants, which deed was delivered to me by said Newman in escrow, together with the original note, also in
218 escrow, a copy of which note is hereto annexed & which reads as follows:

"$10,682.74. LEXINGTON, Mo., *October* 12, 1871.

One day after date the Lexington, Lake & Gulf Railroad Co. promise to pay to Munroe & Company ten thousand six hundred & eighty-two $\frac{74}{100}$ dollars, for value received, negotiable & payable, without defalcation or discount, with interest from *due* at the rate of ten per cent. per annum.

(Signed) LEXINGTON, LAKE & GULF R. R. CO.
By the president, JNO. REID."

To which is affixed United States revenue stamps amounting to five dollars & thirty-five cents, & on which is endorsed & was at the time: "Received on the within note five thousand dollars of Mr. Chapman, trustee. (Signed) H. L. Newman;" and also endorsed, "Monroe & Co.;" and also was delivered to me a certain other instrument in writing purporting to be an indenture made the 16th day of January, A. D. 1872, between the Lexington, Lake & Gulf Railroad Co., Moses Chapman, & Henry L. Newman & Jno. W. Waddell, a copy of which is hereto annexed with the acknowledgements thereto attached & certificates of record. These papers were delivered to me, as stated, to be held by me under the terms of the
219 written agreement of March 12, 1880, & to be delivered to the said receiver on compliance with his part of the agreement, the note to be cancelled upon payment of the seventeen thousand seven hundred & fifty ($17,750) dollars mentioned in the agreement. The original of the documents are herewith delivered to the examiner, to be submitted with this deposition to the court & to be returned to me, unless under the orders of the court the receiver becomes entitled thereto. I have held these papers ever since they were first delivered to me, as stated, for the purpose of delivering them to the receiver upon his compliance with the terms of his

agreement. This, I believe, answers the interrogatory, as far as I remember now.

Interrogatory No. 4. State whether or not said receiver Smith or any one for him has at any time since said papers were placed in escrow in your hands applied to you for said papers in pursuance of the terms of said contract.

Answer. Never.

Interrogatory No. 5. State if you know of any matters relating to the issues in this controversy other than matters heretofore stated by you in this deposition.

Answer. I do not recall anything that I know pertinent to
220 the issues, although there may be such things in my knowledge & would be recalled if I were questioned particularly in reference thereto.

JOHN W. NOBLE.

At the conclusion of this deposition P. Henry Smythe, being present as attorney for the Burlington & Southwestern Railway Co., the Farmers' Loan & Trust Co., and Elijah Smith, receiver, objects to so much of witness Noble's statements as are made in his answer to question No. 2 as refers to conversations & negotiations occurring between the parties prior to the execution of the written instrument referred to by witness as being incompetent & inadmissible.

Cross-examined by P. HENRY SMYTHE:

Interrogatory No. 1. Who delivered to you papers on the first of April, 1880, referred to by you?

Answer. Mr. Henry L. Newman.

Interrogatory No. 2. Where?

Answer. In the city of St. Louis.

Interrogatory No. 3. Did you execute any receipt or paper to him for them?

Answer. If I did I have forgotten it.

221 Interrogatory No. 4. Who was present when it was done?

Answer. It was done in my law office, in St. Louis, where I transact my business, and whether any one was present beside Mr. Newman I do not remember.

Interrogatory No. 5. Elijah Smith was not present, nor any one representing him?

Ans. I am not certain, but I think not.

Interrogatory No. 6. You have retained the papers ever since, down to this time?

Answer. I have.

Interrogatory No. 7. Your relation to them has simply been that of a holder of them under the agreement referred to?

Answer. Yes; I have kept them in my safe, the two deeds & the note in escrow, to be delivered pursuant to the terms of the agreement.

Interrogatory No. 8. Under the terms of the agreement or otherwise, were you ordered to deliver them after the expiration of nine months from 18th December, 1870?

This question was objected to by Tilton Davis, attorney for Henry L. Newman & Jno. W. Waddell, as irrelevant.

Answer. The agreement will speak for itself; I under-
222 stood it to authorize the delivery whenever the court should direct it, even after the nine months, according to the terms of the agreement. I have had no instructions from Mr. Newman, although he has frequently expressed to me a wish that the receiver would comply with his agreement & receive the papers, as well since the nine months have lapsed as *well as* before.

Interrogatory 9. You never communicated this to the receiver?

Tilton Davis objected to this question.

Answer. I don't remember of ever communicating to the receiver. I do not remember doing so within the nine months.

JOHN W. NOBLE.

Deposition of P. Henry Smyth.

Portion of deposition of P. Henry Smythe on behalf of H'y L. Newman, trustee.

Interrogatory No. 4. State, if you know, how much & to what extent the work had been done on that portion of the said Linneus Branch north of the Missouri river, on or about the first of April, 1872?

Answer. I don't know.

Int. No. 5. Had any grading been done or iron placed on
223 said portion of road last referred to at said date?

Ans. I never was over that road until long after that date, & have no personal knowledge on the subject; as I understand it, the Linneus Branch succeeded to a prior organization that had done a large amount of work before 1872; this knowledge I acquired from others interested about the time the branch line came into the control of the B. & S. W. Railway Co.

Int. No. 9. State if you do not remember being in Unionville during the summer of 1873; &, if so, do you not remember & know that no iron was laid southward therefrom at said date?

Ans. I remember of being in Unionville about 1873; my recollection is it was in February; I don't think I was to the end of the track, although I am not sure; that was said to be the terminus to which trains at that time were operated, & I have no knowledge that the track had been laid south of that; my information was that they commenced laying iron on the Linneus Branch at Laclede & laid the track northwardly; that is my recollection, but I am not certain.

224 Int. No. 10. What is your information as to the number of miles of track laid northward from Laclede during the year 1872?

Ans. I don't recollect that I have any information as to what was done in 1872; I can't remember whether it was 1872 or 1873 that that track was laid north of Laclede.

Int. No. 12. State, if you know, when said branch passed into the hands of a receiver.

Ans. I think about August or September, 1874; that is a matter of record in this case, & I respectfully refer counsel to the record.

Int. No. 13. You state you do not know what portion of said road was ironed northward from said Laclede during the years 1872 & 1873; now, I ask you if you do not know that about half said line of road between Unionville & Laclede, under an order of the court in said case No. 297, was completed by the receiver of the said road, passed into the hands of the receiver in 1874?

Ans. I know nothing about it only from hearsay, except that I now know that road is completed from Unionville to Laclede, having passed over it in 1879 or 1880—my recollection is—for the first time; I know by my connection with the case about the order referred to; I think the gap the receiver was to fill was claimed to be about twenty miles.

225

Int. No. 15. Have you any belief, knowledge, or information as to said distance?

Ans. Yes; I have some of these he has named; I have often heard the distance named. It frequently occurs in papers referring to the road. My understanding is it was between fifty & sixty miles; I don't remember exactly.

Int. No. 16. State what you know, if anything, of subscriptions made to the capital stock of companies building said line of road by the counties — Sullivan & Putnam?

Ans. I understand that bonds were contributed by Sullivan & Putnam counties to the extent of three hundred thousand dollars, one hundred thousand in Putnam & two hundred thousand in Sullivan. This is my information. I had nothing to do with the subscriptions nor the receipt of the bonds. My statement is made simply from a knowledge of the history of the road & the litigation which I have been connected with.

226

Int. No. 18. State, if you know, what consideration, if anything, was paid by said branch for said large amount of work referred to by you acquired by said branch in Linn county.

Ans. I don't know of any consideration. If there was any I have no knowledge, except *to* it was to get in with & be identified with a company building a road from the East. There may have been considerations that I knew nothing about.

Int. No. 19. Are you not cognizant of the fact, as an attorney & party engaged in drawing contracts for said Burlington & Southwestern Co., at the date of the acquisition of said property in said Linn county, & that the same passed to said branch without any consideration whatever therefor?

Ans. I have already stated all I remember or know about, & cannot make it any more explicit.

Int. No. 20. State, if you know, the extent of the certificates authorized to be issued & used in the completion of the twenty miles of road heretofore referred to by you.

227

Ans. I don't know anything about it. If I ever saw one of those certificates I have no recollection of it.

Int. No. 21. Were you not the attorney for the receiver, & did you not get up or assist in getting up the papers in & about said application for the issuing of said certificates for the completion of said piece of road?

Ans. I have been an attorney for the receiver, Elijah Smith, ever since he was appointed. He has had other attorneys. I probably had something to do with the legal part of making application for authority to issue said certificates.

Int. No. 22. Is not your name signed to the papers making such application?

Ans. Very likely, but I do not remember whether I made the application or not. I do remember that it was made.

Int. No. 23. Do you remember what amount was authorized to be issued?

Ans. I think two hundred thousand dollars. I think the order of court will show best.

Int. No. 25. State whether or not the road is operated south of Laclede.

228 Ans. It was not the last time I saw it. If it is now I don't know it.

Int. 26. Then the only portion of the Linneus Branch that is completed & being operated is that part of the line between Laclede & Unionville, in the counties of Putnam & Sullivan & Linn?

Ans. So far as I know, that is so. I don't know of any contention on that subject.

Int. 27. State, if you know, what corporation is now the owner, by lease, purchase, or otherwise, of said Linneus Branch.

Ans. I don't know of my personal knowledge. I understand from parties in interest the title is still in Elijah Smith, trustee, who purchased at the master's sale for the bondholders. No lease has ever been executed that I know of, although I understood at one time the terms of one was agreed upon between the C., B. & Q. R. R. Co., & I think Smith, representing the bondholders; but I was also informed that — whole arrangement was changed, or agreed to be changed, & some other arrangement — for a sale of the interest of the bondholders. Nothing has been consum-ated, as far as I know.

229 Int. 28. Do you not know, of your own personal knowledge or from information from parties in interest, that the main line of said B. & S. railway & said Linneus Branch, both said branch and main line, have passed or an agreement exists passing said property into the ownership of said Chicago, Burlington & Quincy Railroad Co.?

Ans. I have told you what I knew about it. I can go more into detail as to what has been done as to reorganization; after the master's sale a new corporation was formed in Missouri, & also one in Iowa. These two corporations agreed upon a consolidation which is still in process of perfection, the consolidated corporation representing the bondholders of both the main and branch lines, each holder of a bond or bonds in either of the old organizations — be entitled to an equal amount of stock in the new. The articles of consolidation are on file in the office of the secretary of state of

Iowa for the benefit of all parties concerned. I am informed that some arrangement is agreed upon or understood, but not consummated, by which the C., B. & Q. is to purchase the stock of the consolidated company, and that when the arrangement is con-
230 summated it is to take effect as of some past date, either July or September, 1881, I am not sufficiently advised to state; all I have stated about it I have heard from others.

Int. 29. Are you not a holder of some portion of the stock or bonds spoken — in relation to said consolidation & transfer to the C., B. & Q. R. R. Co.?

Ans. I am a holder of claims which is entitled to the same as bondholders are entitled to.

Int. 30. Then you are a party in interest in the consolidated company?

Ans. Yes.

The counsel for the receiver & trustees objects to all of the foregoing deposition as being incompetent, irrelevant, immaterial, & not tending to establish any issue in the case.

Witness P. HENRY SMITH makes this further statement as for cross-examination or explanatory of what has already been said: That, so far as I am concerned or know, there has been no meeting of the board of directors of the consolidated company before referred to; in fact, I think the articles of consolidation are not
231 yet recorded in Missouri, & that whatever arrangement has been made is between the holders of bonds of the B. & S. W. Co. & the C., B. & Q. road. My information on this subject is not very full.

P. HENRY SMYTH.

Deposition of Tilton Davis.

My name is Tilton Davis; my residence is St. Louis, Missouri; my occupation, a lawyer; age, forty-six. I know Henry L. Newman, John W. Waddell, Elijah Smith, & also know of the corporations known as the Burlington & Southwestern Railway Co. & the Linneus Branch thereof, & I am also familiar with what was known as the Lexington, Lake & Gulf Railroad Company & of the property, franchises, & matters pertaining to said last-named company. I know of a lease made on the 23d day of February, 1872, between the Lexington, Lake & Gulf Railroad Co. & to the Burlington & Southwestern Railway Co. for its Linneus Branch, & am familiar with its terms & provisions, which provided, among other things, that said Burlington & Southwestern Railway Co. undertook & agreed to iron, equip, operate, & complete said Lexington, Lake & Gulf railroad as it then existed, extending from Lexington,
232 Missouri, southward through the counties of La Fayette, Johnson, Jackson, Cass, & the greater portion of Bates county; also a small portion of Vernon county & all of the distance of about ninety-one miles of road, graded, bridged, & mostly tied, which had cost at the date of said lease & was worth about six hundred thou-

sand dollars, said Burlington & Southwestern Company, for said Linneus Branch, agreeing & obligating itself, within five months of said date of said lease, to commence the laying of iron on said leased property at Lexington, Missouri, & to prosecute said work in good faith & to complete the same out of the proceeds of mortgage bonds to be placed thereon, in connection with said branch north of the river or from other sources, & which said lease, for the purpose of enabling said Burlington & Southwestern Railway Co. to raise the means to complete, equip, & operate the said leased property, including its Linneus Branch, north of the river, authorized, made, & constituted said portion of said Linneus Branch north of the river & said Lexington, Lake & Gulf Railroad south of the river one line of railroad, all known as the Linneus Branch & all agreed & authorized to be included in one common mortgage, to be placed thereon by said Burlington & Southwestern Railway Co. for the purpose of completing said line of road both north & south of the Missouri river, neither of which said portions of said
233 branch road, so known at the date of said lease was ironed; that said portion of said line of road south of the river at said date was by far the most valuable part of said line of road, & had had expended thereon much the larger sum of money at the date of said lease. Said lease also recited that said leased property as aforesaid was subject to liens, incumbrances, & debts to about the sum of fifteen thousand dollars due contractors thereon; that pursuant to the terms of said lease, within a very short time after the date thereof, I think about April the first, 1872, said Burlington & Southwestern Railway Co., for said branch, placed a mortgage upon the entire property, rights, & franchises of said Linneus Branch, including said leased premises, I think at the rate of twenty thousand dollars per mile, & issued & disposed of the bonds secured by said mortgage about the sum of one million six hundred thousand dollars, no portion of which was applied to the construction, ironing, or completion of said portion of said line of road south of the river, as required by the terms of said lease, & as in good faith it was bound & obligated itself so to do; that default being made in the payment of interest on said bonds, as stipulated in said
234 mortgage, proceedings of foreclosure were instituted in said court on said bonds & mortgage, & I think at the April term, 1876, a decree of foreclosure was entered, & pending said proceedings Elijah Smith was appointed receiver of said Burlington & Southwestern Railway Co. for said branch; that said Burlington & Southwestern Railway Co., also for said branch, on the 16th day of May, 1873, entered into a contract with said Lexington, Lake & Gulf Railroad Co. similar in terms to said lease, & wherein it also obligated itself to assume & agreed to pay the then outstanding indebtedness of said Lexington, Lake & Gulf Railroad Co. to the extent at that date of twenty thousand dollars, without reference to what interest may have accrued thereon; that a copy of said lease, marked "Exhibit A," is herewith filed as a part of this deposition; that said contract & agreement of May 16, 1873, is also herewith filed & marked "Exhibit B;" that some time in December, 1879,

said Elijah Smith came to my office in the city of St. Louis, & as receiver of said Burlington & Southwestern Railway Co. expressed a desire to enter upon negotiations looking to the settlement of outstanding claims against said Lexington, Lake & Gulf Railroad Co., & representing that he, as such re-
235 ceiver, would settle such outstanding indebtedness heretofore referred to, & was ready & prepared to commence & complete said leased portion of said road south of the river, as contemplated & agreed upon in said lease, & proposed, among other things, to settle & adjust a claim, dated March 3, 1873, for the sum of five thousand six hundred & sixty-six $\frac{6}{100}$ dollars, & due one year after date at ten per cent. interest from date, & held & owned by myself and against said Lexington, Lake & Gulf Railroad Co., & constituting a part of the indebtedness referred to in said contract. He proposed a settlement of all matters between ourselves, & as a compromise of said note so held by me as aforesaid to give to me a contract as receiver for the sum of five thousand dollars. I said to said Smith that I doubted his authority to act without the authority of the court. He represented that he was about starting proceedings authorizing him generally to settle claims, particularly the claim of one Henry L. Newman, & that if I would accept the terms proposed he would have the order so made as to adjust & pay my claim. I finally agreed if such an order could be procured as he indicated that I would accept the settlement as proposed.
236 Pursuant to said understanding, in behalf of myself & others, said Smith, as receiver, did apply to said court in said case for such authority & had such proceedings, as will appear from the records of said court, in that behalf. After the making of said order under said proceedings a contract was made between myself & said Smith, as receiver in said case, dated March 17, 1880, executed in duplicate, one of which is held by myself & herewith filed, marked "Exhibit C;" that at the time of the execution & delivery of said contract just referred to I delivered to P. Henry Smithe, attorney for said Smith & said Burlington & Southwestern Company, said note assumed & agreed to be paid as provided in said contract. Said note is still held by said Smith, as far as I know, & he has failed to redeliver the same or comply with, pay, or adjust the amount or sum agreed to be paid. I have demanded, I think, some time in January, 1881, & on several occasions since that date, payment or adjustment of said contract; that he has failed & neglected so to do, & that the amount evidenced by said contract still remains due & unpaid; that since the date of said foreclosure said property, including said Lexington, Lake & Gulf property, has been sold under the decree of foreclosure in said suit & pur-
237 chased by said Elijah Smith, trustee, for the bondholders for the sum of one million dollars in bonds. In relation to the respective values of that portion of Linneus Branch north of Missouri river & that portion south of the river, out or from which it is agreed in said contract that said sum of five thousand dollars shall be paid, I will state that at the date of said mortgage that said portion south of the river constituted the most important portion of

said line & the bulk of security for said mortgage. Subsequent to the execution of said mortgage said portion of said road north of the river, between Unionville & Laclede, Missouri, of a distance of about fifty miles, was ironed by means of bonds placed in gross & entirety upon said Linneus Branch, including said leased premises, said portion of said road between — two places last named north of the river being mostly graded by means of county & township bonds in aid thereof & of the one million six hundred thousand dollars of bonds placed upon said property in gross & disposed of by said company, &c., owned & represented by the persons & bondholders who petitioned said court for said order to settle & adjust said outstanding claim as aforesaid. I should think when said road was completed & ironed between said towns of Union-
238 ville & Laclede it would represent of said bonds of one million six hundred thousand dollars not exceeding one million thereof, & the remainder, or six hundred thousand dollars of said bonds, would be represented & secured by said portion of said Linneus Branch south of Missouri river, & being that portion mentioned in said contract as subject to the payment of the amount therein indicated. At the date of said contract, of course, said property south of the river had deteriorated materially in value by reason of the rains, neglect to keep same up, decay of bridges & ties thereon, but was well worth & would represent, as an integral part of said road, if carried out & finished as contemplated in said lease & as indicated in petitions of said receiver to borrow money & issue certificates to complete the same & pay said outstanding indebtedness, one-tenth of the whole amount of bonds issued & disposed of on said line. At any rate, assuming said bonds to be of less value than their face as a railroad investment, & with parties desiring to engage in the building of railroads, it would be worth at said date of said contract seventy-five to one hundred thousand dollars, & parties other than the Burlington & Southwestern Railway Co. proposing to
239 iron a portion of said line of roads a short time prior to the consummation of said contract proposed & were willing to give fifty thousand dollars therefor, but which negotiations were interfered with by said Smith & broken off by reason thereof. I am unable by reason of the surroundings & circumstances connected with railroad matters & investments to fix any definite value upon said property at this date. With proper management in the hands of railroad men said property could be made very valuable; otherwise in other hands it might be worthless. Said Burlington & Southwestern Railway Co. have neither since the date of said lease nor the application of said receiver to borrow money, nor said Smith as receiver, spent one dollar nor done a single lick of work upon said property as it existed when leased. The only thing that I understand has been done since said sale under said foreclosure has been to reorganize said Linneus Branch in its entirety, & which said new organization, as I am informed, has leased in perpetuity or sold said Linneus Branch, including said Lexington, Lake & Gulf property, to the Chicago, Burlington & Quincy Railroad Company; and
240 that said parties are endeavoring, as far as I know, to get &

own said leased property without the payment of one cent therefor, there never having been paid by said Burlington & Southwestern Railway Co., said receiver, or any other person or corporation one cent for said property or on the debts assumed to be paid; nor has a single agreement or obligation made been complied with or discharged in any respect whatever.

TILTON DAVIS.

P. Henry Smythe, counsel for receiver and trustees, objects to all the statements of witness Davis contained in the foregoing pages which attempt to show the contents of written documents, the lease of the L., L. & G. road, the mortgage on the same, or the records of the court in court proceedings, the same not being the best evidence; also objects to his statements of all negotiations between him & Elijah Smith, receiver, or his counsel prior to the execution of the contract upon which his intervening petition herein is based, because the same are all merged in the written agreement; also to all that part of the deposition stating understandings without stating facts, & also all statements based on information, the same being hearsay & incompetent & inadmissible.

241 Interrogatory No. 1. What payment did you ever receive from the L., L. & G. Co. on the note you have referred to?

Answer. I never received a dollar.

Interrogatory No. 2. What was said note given for?

Answer. My recollection is that it was for monies advanced for the furtherance of the building of the L., L. & G. R. R., expenses connected therewith, on my part; also part consideration for right of way of said roads, & a portion for salary due & owing me at the date of said note, as authorized by the board of directors of said L., L. & G. R. R. Co.

Interrogatory No. 3. How do you know the Linneus Branch was sold, as you have stated?

Answer. Well, I saw the notice of sale. The receiver told me it was sold; also Mr. Hatfield, one of the attorneys of the receiver, told me so, & I am not certain, but I have an impression that also I got the information from Judge Smythe, one of the attorneys in the case. I also saw & read the report of the special master in chancery making the sale; also a deed made by said special master, filed with the papers at Jefferson City, & was also present at the July
242 term of said court last & heard & saw the order confirming the sale, & from other sources that I do not now remember.

Interrogatory No. 4. Then your knowledge consists, first, in what you have heard others say; &, second, from what appears from the records in this cause?

Answer. My knowledge is based on the statement before made.

Interrogatory No. 5. Are you a judge of the value of railroads?

Answer. I have had a good deal to do with railroads as attorney for & against, & try to keep myself informed as well as possible, & claim to know about as much as is necessary to know about the Burlington & Southwestern R. R., having been at one time one of the

executive committee, but had nothing to do with the disposition of its bonds.

Interrogatory No. 6. How much is there of this L., L. & G. road south of Lexington?

Answer. I think about ninety miles of graded, bridged, & partly tied road, of work that was well done at the time.

243 Interrogatory No. 7. Well, what would be the reasonable value now of that ninety miles of road?

Answer. I am unable to fix any value upon it. In the hands of railroad men & capitalists, with connections made with other railroads, especially roads giving it a northern & southwestern outlet, it would be valuable, but in the hands of men with small means & inability to make such arrangements as indicated, I would regard it as almost worthless; and at this time, should a severance take place of said Linneus Branch at Lexington, unless arrangements indicated could be made, — or placed in the hands of capitalists, I should regard it as destructive of the value of the property.

Interrogatory No. 8. Has not what you have just stated been true of it always & at all times as well as now; &, if not, why not?

Answer. Not to the extent that it now obtains. At the date of making this contract the property was not in as bad condition as it is to-day.

Interrogatory No. 9. You have recently discussed its value & merits with railroad men, have you not?

244 Answer. I can't say that I have recently done so.

Interrogatory No. 10. This road is worth something, is it not?

Answer. I have given my answers in that behalf & I don't know that I can make it more explicit.

Interrogatory No. 11. How, then, can you state, as you have done, that its value is equal to one-tenth of one million six hundred thousand bonds issued?

Answer. I fix that upon basis of original cost, the proportion of the one million six hundred thousand dollars of bonds placed thereupon, the enhanced value of the portion north of the river & depreciated value of that south of the river, & in comparison & extent of the bonds placed thereon & the extent of security given by said part south of the river at the time of the disposition of said bonds.

Cross-examination of TILTON DAVIS continued:

Interrogatory No. 12. What is the distance from Lexington, Mo., to Laclede?

Answer. I think about sixty miles.

245 Interrogatory No. 13. The Linneus Branch was never built over this part of the line, was it?

Answer. It was not.

Interrogatory No. 14. From Laclede to Burlington, Iowa, the branch & main line had been completed, equipped, & operated as a continuous line for several years prior to the master's sale in this case, had they not?

Ans. I am unable to state the exact nature of the operation of the main line & branch, but assume that it was operated as provided by law in relation to main — & branches & as provided in the lease making said branch & heretofore referred to, & that whilst cars would run through & over the main line & branch from Burlington to Laclede distinct & separate accounts should have been kept for each part, respectively, but I am unable to state in what manner it was done.

Int. No. 15. My question had no reference to the earnings or how the accounts were kept, but called for your knowledge as to whether the roads had been so built & trains operated over them between Laclede & Burlington.

246 Ans. Possibly they may have been operated as indicated in the interrogatory, but of this I have no personal knowledge.

Int. No. 16. Hav'n't you as much knowledge on this subject as you have in reference to the sale you have testified about?

Ans. I think not, but I am quite sure the roads were built between the points named.

Int. No. 17. You say in your deposition that Smith never returned the note; that you frequently demanded payment. Did you ever demand the return of the note of the L., L. & G.?

Ans. I never did. I considered the transaction between myself & Smith a *bona fide* one, made in good faith, & he assured me on several occasions that the contract should & would be carried out in good faith on his part.

(All the answer commencing with "I considered" objected to — counsel for receiver as being irresponsive to the question.)

Int. No. 18. Your demand, then, was always for money?

Answer. No; it was not. I did demand a settlement pursuant to terms of contract, saying to him, however, that his failure

247 to comply with the contract at the date it was due would authorize me to demand money, but for the sake of settlement I would settle, rather than have a controversy in court, in either of the modes indicated in the contract.

Int. No. 19. Is that all you are asking now?

Ans. My petition in the case demands payment in the sum of five thousand dollars & interest from the first day of January, 1881, but if Mr. Smith will settle matters as agreed upon in good faith I am not unwilling to prevent an adjustment of our matters on the basis of the contract.

Int. No. 20. Don't you know that there has been no determination as to what securities the bondholders are to receive; that none have been issued, & that the receiver had until that was determined to elect what he would do?

Ans. I know nothing about securities the bondholders are to receive, but only know that said amount is stipulated in said contract; that said sum should be paid so soon as said property shall have been sold under the decree of foreclosure & title perfected in

248 purchaser, which has been done long since.

Int. No. 21. Had that been done when your interplea was filed?

Ans. Sale had been made & report of master making the sale & deed thereunder filed in said court.

Int. No. 22. The sale had not been confirmed, however, nor the deed delivered?

Answer. I know nothing of the delivery of the deed, but it was sought to have said approval made, I think, at the time of filing the complaint.

Int. No. 23. You have already testified that you were in court when the order of confirmation was made; that was on the 5th July, 1881?

Ans. My recollection is that the proceedings looking to the confirmation of said sale before commenced & asked in the report of the master for the sale made Nov. 30, 1880, were finally entered of record about July 5, 1881.

Int. No. 24. Was any order confirming the sale ever made until July 5, 1881?

249 Ans. I am unable to state of my own personal knowledge. The only order I know of, of my own knowledge, is July 5, 1881.

Int. No. 25. You have stated that the building of the ninety miles of road south of Lexington cost about six hundred thousand dollars. How do you know this?

Ans. I know it from the state of contract & knowledge of the records of the company that built it.

Int. No. 26. Was the work done at fair prices, & how do you know?

Ans. The work was done at exceedingly low prices; very much lower than was paid for similar work at that time. The work done—pronounced by railroad men & was first-class work & was in first-class condition, including about one hundred thousand ties, at the date of said lease. I know these matters by the inspection of contracts of parties engaged in the construction, & I had knowledge of other work that was being done at same time in that part of the country, & I know that the amount of work done on this road was far greater in magnitude than on other enterprises in that part of the State.

250 Int. No. 27. How do you know its present condition & how much it has deteriorated since the lease was made?

Ans. I have lived in Lexington, Mo., the past sixteen years, until recently. I have come to St. Louis, where I am now living, & have quite frequently, whilst living at Lexington & since here, had occasion to go along or over or across said property & observed its condition, & of course could see the waste of the elements & decays incident to property of this kind, during the interval from the date of lease to the present time, no care having been given by the Burlington & Southwestern Co. to keep up or repair the same.

Int. No. 28. According to your statement, this ninety miles of road cost about seven thousand dollars a mile to put it into the condition it was at the date of the lease, at fair prices, such as prevailed when

the road was built, as you have stated. How much per mile would it cost to reinstate it to the condition it was in in 1872?

Ans. I have not stated that said road cost seven thousand
251 a mile; but I do undertake to state that the rights of way, depot grounds, the one hundred thousand ties, the engineering expenses, grading, culverts, bridges, &c., with all expenses connected with railroad matters, amounted to about six hundred thousand dollars for the ninety miles, a good portion of which was paid in bonds subscribed by townships through which it passed. I am unable to state.

Int. No. 29. If you knew prices were fair at that time & know how much it has depreciated, & how much it cost to build it, how does it happen that you are unable to state how much it would cost at the same prices to reinstate it?

Ans. I have not made any estimate of my own to the extent that it has washed away, nor what it would cost to replace the ties, what the engineering expenses would be, and therefore — unable to make an approximate estimate thereof.

Int. No. 30. Then you are unable to make an approximate estimate of what the depreciation has been in value since the lease?

Ans. I could not, unless I were to pass over the entire line
252 of roads, with the aid of engineers & information as to materials, &c., but I know that great damage has come to the property by neglect on part of lessees to build it & the interference & prevention on part of others by said receiver who would have built the same.

Int. No. 31. Then, so far as you know, fifty dollars a mile would repair all the depreciation in the condition of the road?

Ans. I know nothing of the sort.

Int. No. 32. Do you know that fifty dollars a mile wouldn't do it?

Ans. I don't know the condition of each mile of said road nor what the contractor would do the work for?

Int. No. 33. Then you don't know that the whole ninety miles of road could not be reinstated at an average of fifty dollars per mile?

Ans. I know nothing about it personally, but I would not assume that it could be done for any such price.

(Counsel for receiver objects to what witness "assumes" in the last part of last answer.)

253 Int. No. 34. Don't you know what a competent party or parties have offered to reinstate it for about two hundred dollars a mile?

Ans. (Question and answer objected to.) Some months ago a party indicated that he would level up the road-bed for the distance of some miles in La Fayette county ready for the ties I think for either two hundred or two hundred & fifty dollars per mile.

Int. No. 35. What did the ties cost that you have testified about?

Ans. My recollection is that they cost about forty cents a piece.

Int. No. 36. What would they cost now?

Ans. I have no knowledge sufficient to form an opinion.

Int. No. 37. Then, so far as you know, the price is the same now it was then?

Ans. I don't know whether it is more or less.

TILTON DAVIS.

254 *Articles of Incorporation of K. C., St. J. & B. R'y Co.*

Certified copy of articles of incorporation of the Kansas City, St. Joseph and Burlington Railway Company.

Articles of incorporation made and entered into this tenth day of March, A. D. 1881, for the purpose of forming a corporation under the laws of the State of Missouri.

Article I.

The following-named persons and all others who may hereafter be associated with them do hereby associate themselves together for the purpose of constructing a railway and branch lines for public use for the conveyance of persons and property in the State of Missouri as hereinafter set out, to wit: Elijah Smith, Henry Sayles, Prosper W. Smith, John N. Denison, Wm. J. Rotch, Wm. Endicott, Jr., Hales W. Suter, Isaac T. Burr, Wm. W. Crapo, Thos. Nickerson, James W. Potter, Moses Taylor, John W. Smith, S. A. Kent, John B. Lyon.

Article II.

This corporation shall be called and known as the Kansas City, St. Joseph and Burlington Railway Company, and shall continue in existence one hundred years with the right of perpetual existence.

Article III.

The capital stock of this corporation shall be three ($3,000,000) millions dollars, and shall be divided into thirty thousand
255 shares of the par value of one hundred dollars each; said capital stock amounting to more than ten thousand dollars for each mile of railway constructed or proposed to be constructed, owned, or operated hereunder.

Article IV.

This corporation is formed for the purpose of owning, constructing, maintaining, and operating a line or lines of railway in the State of Missouri as follows: Beginning at a point on the line between the States of Iowa and Missouri near the town of Mendota, in Putnam county, Missouri, extending thence in a southern direction to the town of Unionville, in said county; thence in a westerly direction through the counties of Putnam, Mercer, Harrison, Gentry, De Kalb, and Buchanan to the city of Saint Joseph, in said county of Buchanan, a distance of one hundred and forty-one and $\frac{4}{10}$ miles, embracing the entire main line of railway in Missouri heretofore owned by the Burlington and Southwestern Railway Company, of

which that portion lying between the point of beginning on the State line aforesaid and the town of Unionville aforesaid, a distance of eleven and $\frac{4}{10}$ miles, is now completed and in operation; and also to own, construct, maintain, and operate a line of railway in the State of Missouri as follows: Beginning at a point of intersection with the main line aforesaid at or near the
256 town of Unionville aforesaid and running thence southwesterly through the county of Putnam, the county of Sullivan, the county of Linn, and thence to Carrollton, in Carroll county, and thence to the Missouri river, at a point at or east of the city of Lexington, in La Fayette county, and from thence to such point in south Missouri as may hereafter be determined, embracing the entire branch line of railway heretofore owned by said Burlington and Southwestern Railway Company and known as the Linneus Branch of the Burlington and Southwestern railway, of which that portion lying between the point of intersection with the main line, at or near Unionville aforesaid and the town of Laclede, in the county of Linn, a distance of fifty-three miles, is now complete and in operation, the remaining distance between said town of Laclede and the city of Lexington being sixty miles.

Article V.

The following-named persons, seven (7) in number, to wit, Elijah Smith, Prosper W. Smith, W. J. Rotch, Wm. Endicott, Jr., Jas. W. Potter, S. A. Kent, John W. Smith, shall compose the first board of directors for the management of the affairs of this association, and they shall continue to be the directors and manage the affairs
257 of said association for the first year and until others are chosen in their places, and during said first year any vacancy occurring in the board shall be filled by the remaining members thereof.

Article VI.

The stockholders of this corporation shall elect a board of directors in every year after 1881, on the third Wednesday in May, which election shall take place at the office of the company in such manner as may be prescribed by the by-laws of this association.

Article VII.

This association is organized under chapter twenty-one (21) of the Revised Statues of Missouri, and is subject to the provisions of said chapter and such other amendatory acts as are now in force and are applicable to the organization of railroad companies in the State of Missouri, and we, the undersigned subscribers to the capital stock of the Kansas City, St. Joseph and Burlington Railway Company, hereby agree to take the number of shares of the capital stock of said company set opposite our names, respectively, and to pay the same at such times and in such installments and in such manner as the directors of said company may require; and we do further hereby agree, respectively, to be governed by the above and foregoing articles of association.

258 Names.	Residence.	Shares.
Elijah Smith	Boston, Mass	2,500
Henry Sayles	Bar Harbor, Me	10
Prosper W. Smith	Boston, Mass.	90
John N. Denison	Boston, Mass.	10
Wm. J. Rotch	New Bedford, Mass.	50
Wm. Endicott, Jr.	Boston, Mass.	50
Hales W. Suter	Boston, Mass.	10
Isaac T. Burr	Boston, Mass.	50
Wm. W. Crapo	New Bedford, Mass.	10
Thos. Nickerson	Boston, Mass.	50
James W. Potter	Boston, Mass.	10
Mose sTaylor, by Percy R. Pyne, att'y	New York	50
S. A. Kent	Chicago, Ills.	50
J. B. Lyon	Chicago, Ills.	50
Jno. W. Smith	Burlington, Iowa	10
Total		3,000

STATE OF MASSACHUSETTS, } ss:
County of Suffolk }

I do hereby certify that on this nineteenth day of March, A. D. 1881, before me, the undersigned, a notary public within and for the county and State aforesaid, appeared Elijah Smith, Henry Sayles, and Prosper W. Smith, who are personally known to me to be the identical persons whose names are subscribed to the foregoing articles of incorporation as incorporators, and they severally acknowledged the same to be their voluntary act and deed for the purposes therein expressed.

Given under my hand and official seal, at my office, in
259 Boston, the day and year last aforesaid.

[SEAL.] J. HENRY BROOKS,
Notary Public.

THE STATE OF MASSACHUSETTS, } ss:
County of Suffolk, }

I do hereby certify that on this nineteenth day of March, A. D. 1881, before me, the undersigned, a notary public within and for the county and State aforesaid, appeared Wm. J. Rotch, who is personally known to me to be the identical person whose name is subscribed to the foregoing articles of incorporation as an incorporator, and has acknowledged the same to be his voluntary act and deed for the purposos therein expressed.

Given under my hand and official seal, at my office, in Boston, the day and year last aforesaid.

[SEAL.] CHAS. MERRIAM,
Notary Public.

THE STATE OF MASSACHUSETTS, } ss:
County of Suffolk, }

I do hereby certify that on this twenty-second day of March, A. D. 1881, before me, the undersigned, a notary public within and for

the county and State aforesaid, appeared John N. Denison, who is personally known to *be* to be the identical person whose name is subscribed to the foregoing articles of incorporation as an in-
260 corporator, and has acknowledged the same to be his voluntary act and deed for the purposes therein expressed.

Given under my hand and official seal, at my office, in Boston, the day and year last aforesaid.

[SEAL.] J. HENRY BROOKS,
Notary Public.

THE STATE OF MASSACHUSETTS, } ss:
County of Suffolk, }

I do hereby certify that on this twenty-third day of March, A. D. 1881, before me, the undersigned, a notary public within and for the county and State aforesaid, appeared Wm. Endicott, Jr., and Hales W. Suter, who are personally known to me to be the identical persons whose names are subscribed to the foregoing articles of incorporation as incorporators, and have acknowledged the same to be their voluntary act and deed for the purposes therein expressed.

Given under my hand and official seal, at my office, in Boston, the day and year last aforesaid.

[SEAL.] WILLIAM A. HAYES, JR.,
Notary Public.

THE STATE OF MASSACHUSETTS, } ss:
County of Suffolk, }

I do hereby certify that on this twenty-eighth day of March,
261 A. D. 1881, before me, the undersigned, a notary public within and for the county and State aforesaid, appeared Wm. W. Crapo, who is personally known to me to be the identical person whose name is subscribed to the foregoing articles of incorporation as an incorporator, and has acknowledged the same to be his voluntary act and deed for the purposes therein expresed.

Given under my hand and official seal, at my office, in Boston, the day and year last aforesaid.

[SEAL.] CHAS. MERRIAM,
Notary Public.

THE STATE OF MASSACHUSETTS, } ss:
County of Suffolk, }

I do hereby certify that on this twenty-ninth of March, A. D. 1881, before me, the undersigned, a notary public within and for the county and State aforesaid, appeared Isaac T. Burr and Thomas Nickerson, who are personally known to me to be the identical persons whose names are subscribed to the foregoing articles of incorporation as incorporators, and have acknowledged the same to be their voluntary act and deed for the purposes therein expressed.

Given under my hand and official seal, at my office, in Boston, the day and year last aforesaid.

[SEAL.] LEVI C. WADE,
Notary Public.

262 THE STATE OF MASSACHUSETTS, } ss:
County of Suffolk, }

I do hereby certify that on this first day of April, A. D. 1881, before me, the undersigned, a notary public within and for the county and State aforesaid, appeared James W. Potter, who is personally known to me to be the identical person whose name is subscribed to the foregoing articles of incorporation as an incorporator, and has acknowledged the same to be his voluntary act and deed for the purposes therein expressed.

Given under my hand and official seal, at my office, in Boston, the day and year last aforesaid.

[SEAL.] J. HENRY BROOKS,
Notary Public.

STATE OF NEW YORK, } ss:
City and County of New York, }

I do hereby certify that on this sixth day of April, A. D. 1881, before me, Joseph M. Bulger, a notary public for said State and county, personally appeared Percy R. Pyne, who is personally known to me and known to me to be the attorney-in-fact of Moses Taylor, the identical person whose name is subscribed to the foregoing articles of incorporation as an incorporator, by his said attorney, and he acknowledged the same to be his voluntary act
263 and deed, as attorney-in-fact for Moses Taylor, for the purposes therein expressed.

Witness my hand and official — this 6th day of April, A. D. 1881.

[SEAL.] JOSEPH M. BULGER,
Notary Public.

THE STATE OF ILLINOIS, *County of Cook:*

I do hereby certify that on this nineteenth day of April, A. D. 1881, before me, the undersigned, a notary public within and for the county and State aforesaid, appeared John B. Lyon and Sidney A. Kent, who are personally known to me to be the identical persons whose names are subscribed to the foregoing articles of incorporation as incorporators, and have acknowledged the same to be their voluntary acts and deeds for the purposes therein expressed.

Given under my hand and notarial seal the day and year last aforesaid.

[SEAL.] CHARLES KILLICK,
Notary Public.

STATE OF IOWA, } ss:
County of Des Moines, }

I do hereby certify that on this twenty-fifth day of April, A. D. 1881, before me, the undersigned, a notary public within and for the county and State aforesaid, appeared John W. Smith, who
264 is personally known to me to be the identical person whose name is subscribed to the foregoing articles of incorporation

as an incorporator, and has acknowledged the same to be his voluntary act and deed for the purposes therein expressed.

Given under my hand and notarial seal the day and year last aforesaid.

[SEAL.] H. B. SCOTT,
Notary Public.

STATE OF ILLINOIS, } ss:
County of Cook, }

Elijah Smith, S. A. Kent, and John W. Smith, three of the directors named in the foregoing articles of association, being duly sworn, upon their oaths state that they are stockholders and directors in the said Kansas City, St. Joseph and Burlington Railway Company; that there has been subscribed to the capital stock thereof at least one thousand dollars for each mile of completed and projected line of railway, and that subscription has been made in good faith, and that at least five per cent. of such thousand dollars per mile has been paid to the directors of said company in cash, and it is intended to operate and maintain the completed portion thereof and
265 complete the projected portion and in good faith perform all the acts provided in the articles of association.

ELIJAH SMITH.
S. A. KENT.
JNO. W. SMITH.

Subscribed and sworn to before me this twenty-eighth day of May, A. D. 1881.

[SEAL.] ORSON SMITH,
Notary Public.

Filed May 30, 1881, at 9 o'clock a. m.

MICH'L K. McGRATH,
Secretary of State.

STATE OF MISSOURI, ss:

I, Michael K. McGrath, secretary of state of the State of Missouri, hereby certify that the annexed pages contain a full, true, and complete copy of the articles of association of the Kansas City, St. Joseph and Burlington Railway Company and of the affidavit of three of the directors of said company thereto attached, filed May 30, 1881, as the same appears on file and of record as the law directs in my office.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State of Missouri.

Done at office, in the city of Jefferson, this fourteenth day of
266 April, A. D. eighteen hundred and eighty-three.

[SEAL.] MICH'L K. McGRATH.
Secretary of State.

Report of Lacey, Master, as to Sup'l Deed.

Report of H. Lacey, master, as to supplemental deed. Filed April 18, 1882.

In the United States Circuit Court, Eastern Division of Western District of Missouri.

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE BURLINGTON & SOUTHWESTERN RAILWAY COMPANY *et al.* } Eq. No. 297.

To the honorable judges of the United States circuit court, western district of Missouri:

Harry Lacey, the master appointed by the decree of foreclosure herein filed May 19th, A. D. 1876, to sell the property covered by the mortgage foreclosed and described in said decree and to make a deed to the same to the purchaser thereof at said sale, respectfully reports that he advertised said property and sold the same on the 30th day of November, A. D. 1880, as provided by said decree, and made a deed therefor, dated the 13th day of December, A. D. 1880, to Elijah Smith, trustee, the purchaser thereof, which deed
267 was by the court or a judge thereof approved on July 5th, A. D. 1881; that by an oversight said deed omitted to contain the exact description given in said decree, and this was not discovered until recently and long after said deed had been approved and delivered; that said omission might affect materially the rights of the purchaser of said property at said sale, and to cover and remedy such omission he has executed and presents herewith a supplemental deed to said property, and asks that the same be approved and delivered to the said purchaser, Elijah Smith, trustee.

HARRY LACEY,
Master in Chancery.

STATE OF IOWA, } ss:
Scott County, }

I, Harry Lacey, being duly sworn, on oath say that I have read the foregoing report and know the contents thereof, and the same is true as I verily believe.

HARRY LACEY.

Subscribed in my presence and sworn to before me by the said Harry Lacey this 4th day of March, A. D. 1882.

[L. S.] JOHN H. QUINN,
Notary Public, Scott Co., Iowa.

268 *Supplemental Deed of Master.*

Supplemental deed of H. Lacey, special master.

Master's deed.

This supplemental indenture, made this twenty-third day of February, A. D. 1882, between Harry Lacey, master in chancery of the circuit court of the United States for the western district of Missouri, party of the first part, and Elijah Smith, trustee, of Boston, Massachusetts, party of the second part, witnesseth:

Whereas, in pursuance of a decree entered on the nineteenth day of May, A. D. 1876, by the circuit court of the United States for the western district of Missouri in a certain case then pending therein on the chancery side thereof, wherein The Farmers' Loan and Trust Company was complainant and The Burlington and Southwestern Railway Company and others were defendants, the said master in chancery duly advertised according to law and the direction of said decree the premises hereinafter described for sale at public auction to the highest and best bidder at Unionville, in Putnam county, Missouri, at the north door of the court-house, between the hours of ten o'clock a. m. and four o'clock p. m. on the thirtieth day of November, A. D. 1880; and whereas, at the time and place so as aforesaid appointed for said sale, the
269 said master in chancery attended to make the same and offered and exposed said premises for sale at public auction to the highest and best bidder, and thereupon Elijah Smith, trustee, offered and bid therefor the sum of one million dollars ($1,000,000) in Linneus Branch bonds, and that being the highest bid offered, said master in chancery accordingly struck off and sold to said Elijah Smith, trustee, for said sum of bonds the said premises; and whereas said premises have not been redeemed from said sale: Now, therefore, in consideration of the premises, the said party of the first part doth hereby convey unto the said party of the second part, his heirs and assigns, the said premises, which are situated in the State of Missouri and described as follows, to wit: "All the real and personal property of said Burlington and Southwestern Railway Company in said Linneus Branch railroad, owned at the date of said mortgage and since acquired in any manner appertaining to said branch, and all the right, title, and equity of redemption therein, whether of said company or the stockholders thereof in said branch or any premises leased therewith; all the branch railroads, including the premises leased, named in said mortgage, extend-
270 ing from the main line of said Burlington and Southwestern Railway Company, at or near Unionville, in the county of Putnam, in the State of Missouri, by the way of Linneus and Lexington to Kansas City, and by the line of said leased premises from Lexington to Butler, in Bates county, Missouri, and to such other point in Southwestern Missouri as was determined upon by the board of directors of said company, or however said branch line of said railroad, including said leased premises, may be described or built,

including the right of way therefor, road-bed, superstructure, iron, ties, chairs, splices, bolts, nuts, spikes, and all the land and depot grounds, station-houses, depots, viaducts, bridges, timber, and materials and property purchased and to be purchased and otherwise acquired after the date of the mortgage for the construction and maintenance of said railroad, and all the engines, tenders, cars, and machinery, and all kinds of rolling stock owned at the date of said mortgage or thereafter purchased for and on account of said branch; all the revenues and income of said branch, and all the rights and privileges and franchises relating thereto and property acquired in virtue thereof, then in
271 possession or thereafter acquired, including machine shops, tools, implements, personal property thereon or along the line of said branch railroad, together with all the property acquired by said Burlington and Southwestern Railway Company by virtue of its lease of said Lexington, Lake and Gulf railroad, and which branch line of said leased road and premises extending from Unionville by the way of Linneus to Kansas City and Southwestern Missouri is known and designated as the Linneus Branch of the Burlington and Southwestern railway; to have and to hold the same, with all the appurtenances thereto belonging, unto said party of the second part, his heirs and assigns, forever.

Witness the hand and seal of said party of the first part the day and year first above written.

(Signed) HARRY LACEY,
Master in Chancery.

STATE OF IOWA, } ss:
County of Scott, }

I, Whittaker M. Grant, a notary public in and for said Scott county, in the State aforesaid, do hereby certify that Harry Lacey, master in chancery of said United States circuit court for the
272 western district of Missouri, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act as such master in chancery for the uses and purposes therein set forth.

Given under my hand and seal notarial this 24th day of February, A. D. 1882.

[SEAL.] WHITTAKER M. GRANT,
Notary Public in and for Scott Co., Iowa.

Order on Report of Master as to Sup'l Deed.

Order of court on report of H. Lacey, master, as to supplemental deed.

In United States Circuit Court, Eastern Division of Western District of Missouri. At Chambers, April 6th, 1882.

THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE BURLINGTON AND SOUTHWESTERN RAILWAY COMPANY *et al.* } Eq. No. 297.

This cause coming on to be heard upon the application of Harry Lacey, special master, appointed by the court in the decree of
273 foreclosure herein to sell and make deed to the purchaser of the property therein described, to approve and deliver a supplemental deed executed to cure an omission in his original deed; and the court being fully advised in the premises, hereby confirms and approves the said supplemental deed and directs the clerk of this court to spread the same upon the proper records of the court and to deliver the same with a duly certified copy of this order to the purchaser, Elijah Smith, trustee, or his attorney.

GEO. W. McCRARY,
Circuit Judge.

Proceedings in Case of Smith, Rec'r, vs. Newman & Others.

Proceedings, case 1377, Elijah Smith, receiver, *vs.* Henry L. Newman *et al.* Bill for injunction in Farmers' Loan & Trust Co. *vs.* Burlington and Southwestern R'way Co.

Bill.

In the Circuit Court of the United States for the Western District of Missouri.

THE FARMERS' LOAN & TRUST CO.
vs.
THE BURLINGTON & SOUTHWESTERN RAILWAY COMPANY.

Bill for injunction.

274 Petition of Elijah Smith, receiver, for an injunction and a rule on certain persons herein named to show cause why they shall not be punished for a contempt of this court.

Your petitioner represents that in the above-entitled action now pending in said court he was, in 1875, duly appointed by said court a receiver of all of the property, rights, & franchises of the Burlington & Southwestern railway, known as the Linneus Branch of said railway; that the mortgage set up in the bill of the plaintiffs and sought to be foreclosed covered and included all of the railroad, rights of way, property, and franchises of what is & was known as the Lexington, Lake & Gulf Railway Company, consisting in

part of a graded road-bed extending from Lexington, in La Fayette county, to Butler, in Bates county, & southwardly, and that since his appointment he has had said property in his control, custody, & possession, as directed and authorized by the order of this court; and that he has in no manner been discharged from his duties to take & hold the same until further orders of this court.

But so it is, as your petitioner is informed and believes, that Henry L. Newman, of St. Louis, Mo., claims to have the right
275 of possession thereof and to have acquired the same in some manner since the appointment of your receiver, and has attempted & is proposing to take and occupy said property in some way adverse to your petioner; that M. S. Cowles, of Bates county, W. H. Barrett, of Cass county, and E. H. Brown & Frank Playter, James I. Brooks, J. H. Nash, Joseph E. Young are setting up some adverse claim to that of your petitioner and are attempting, under some authority from said Newman or otherwise, to interfere with the right, title, & possession of said property, and are attempting to acquire from persons unknown to petitioner some portions of the right of way occupied by said road-bed or line of road through the pretence that the same did not belong to said Lexington, Lake & Gulf Railroad Company, or that they have acquired some right through said company; and petitioner is advised that said persons or some of them have trespassed upon some portions of said property and are making efforts to occupy the same for some uses adverse to the interests of petitioner & his beneficiaries, the plaintiffs and their "*cestuis que trust;*" that all of said acts and threats are adverse to the right & claims represented by your receiver and in conflict with the same.

276 Your petitioner therefore prays that an order may issue enjoining and restraining the said Henry L. Newman and the said J. W. Waddell and all the other persons herein named & all persons from attempting to interfere with any portion of the property of said Lexington, Lake & Gulf railroad, or which by the decree of this court was committed to the control of this receiver.

And, also, that said defendant be required to appear at the next term of this court or such other time as the court may fix and show cause why they should not be punished for a contempt of this court in interfering with the property in its custody.

Petitioner further prays that all acts of said defendants or either of them or those claiming under them touching either the title or possession of said property may be vacated, set aside, and held for naught and for such general relief as your petitioner may on the final hearing show himself entitled to.

ELIJAH SMITH, *Receiver*,
By P. HENRY SMYTH, *His Counsel.*

Elijah Smith, being duly sworn, on his oath states that he is the petitioner named in the foregoing petition; that he is ac-
277 quainted with the contents of said petition, and the statements thereof are true, as he verily believes.

ELIJAH SMITH.

Subscribed in my presence and sworn to before me this 24th day of December, 1879.

[SEAL.] GEO. F. HILTON,
Notary Public.

Order of Court.

AT CHAMBERS, KEOKUK, IOWA, *December 24th*, 1879.

Having this day heard the foregoing application for an injunction and order to show cause, it is ordered and adjudged that the order restraining and enjoining the parties therein named from setting up any claim or interfering with the possession of the receiver to the property named as prayed for issue under the seal of the court upon the filing of a bond in the sum of $1,000, to be approved by the clerk of the court. Said parties are also required to *to* appear at the April term, 1880, & show cause why they should not be adjudged guilty of contempt of this court & punished therefor.

GEO. W. McCRARY,
Circuit Judge.

278 *Writ of Injunction, &c.*

UNITED STATES OF AMERICA,
Eastern Division of the Western District of Missouri.

Injunction.

The President of the United States of America to Henry L. Newman, M. S. Cowles, E. H. Brown, W. H. Barrett, Frank Playter, James S. Brooks, J. W. Nash, Joseph E. Young, and J. W. Waddell:

Whereas it has been represented to the Honorable George W. McCrary, judge of the eighth judicial circuit, sitting at chambers. in the city of Keokuk, Iowa, on the 24th day of December, A. D, 1879, that in the year 1875 Elijah Smith was by this court appointed receiver of all the property, rights, and franchises of the Burlington and Southwestern railway, known as the Linneus Branch of said railway, by an order entered of record in case No. 297, entitled Farmers' Loan and Trust Company *vs.* Burlington and Southwestern Railway Company and others; that the mortgage set up in the bill of plaintiffs in said cause and sought to be foreclosed covered and included all of the railroad, right of way, property, and franchises of
279 what is and was known as the Lexington, Lake and Gulf Railway Company, consisting in part of a graded road-bed extending from Lexington, in La Fayette county, to Butler, in Bates county, and southwardly, and that since his appointment he has had said property in his control, custody, and possession, as directed and authorized by the order of this court, and that he has in no manner been discharged from his duties to take and hold the same until the further orders of this court;

And whereas it has been further represented, on information and belief, that Henry L. Newman, of St. Louis, claims to have the right of possession thereof and to have acquired the same in some manner

since the appointment of said receiver, and has attempted and is proposing to take and occupy said property in some way adverse to said receiver; that M. S. Cowles, of Bates county, W. H. Barrett, of Cass county, and E. H. Brown, Frank Playter, James I. Brooks, J. H. Nash, and Joseph E. Young are setting up some adverse claim to that of said receiver, and are attempting, under some authority from said Newman or otherwise, to interfere with the right, title, and possession of said property, and are attempting to acquire from persons unknown to said receiver some portions of the right of
280 way occupied by said road-bed or line of road through the pretense that the same did not belong to said Lexington, Lake and Gulf Railroad Company, or that they have acquired some right through said company;

And whereas said receiver alleges he has been advised that some of said persons have trespassed upon some portions of said property and are making efforts to occupy the same for some uses adverse to the interest of said receiver and his beneficiaries, the plaintiffs in said cause and their "*cestuis que trust;*" that all said acts are adverse to the rights and claims represented by said receiver and in conflict with the same:

Now, therefore, this is to strictly command and enjoin you, the said Henry L. Newman, M. S. Cowles, E. H. Brown, W. H. Barrett, Frank Playter, James I. Brooks, J. H. Nash, Joseph E. Young, and J. W. Waddell, your agents, servants, and employés, and all persons acting with you and for you or at your instigation, from setting up any claim or interfering with the possession of the receiver to the property above named.

And it is further ordered that you appear at and before this court at its next term, to be begun and held at the city of Jefferson, in said district, April 19th, 1880, then and there to show cause
281 why you should not be adjudged guilty of contempt of this court and punished therefor.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 2d day of January, A. D. eighteen hundred and eighty.

Issued, at office, in the city of Jefferson, in said district, under the seal of said circuit court, the day and year last aforesaid.

[L. S.] H. C. GEISBERG,
Clerk of said Court.

Marshal's Return.

I hereby certify that I executed this writ by delivering true copies of it to Henry L. Newman, at St. Louis, Mo.; James J. Brooks, at Kansas City, and E. H. Brown, at Pleasant Hill. The other defendants herein named, to wit, M. S. Cowles, W. H. Barrett, Frank Playter, J. H. Nash, Joseph E. Young, and J. W. Waddell, not found.

Done, at Kansas City, west. dis. of Mo., this 12th day of April, 1880.

C. C. ALLEN,
U. S. Marshal,
By R. M. ELLIOTT, *Deputy.*

282 *Answer of E. H. Brown.*

In the Circuit Court of the United States for the Western District of Missouri, at Jefferson City.

THE FARMERS' LOAN & TRUST COMPANY

vs.

THE BURLINGTON & SOUTHWESTERN R'Y CO.

Separate answer of E. H. Brown.

The separate answer of E. H. Brown, one of the parties named in the petition, filed by Elijah Smith, as receiver, in the above-entitled cause.

Now comes E. H. Brown, one of the parties named in the petition of Elijah Smith, receiver, in this cause, and files this his separate answer to said petition, and, for answer thereto, denies each and every allegation in said petition charging him, his associates, agents, servants, employees, or persons acting with or for him, with setting up or attempting to set up any claim whatever adverse to the claim of said petitioner or to the claim of any other person or any claim at all of any kind whatever to any of the property, rights, or franchises of the Burlington and Southwestern railway, the Linneus Branch of said railway, or of the Lexington, Lake and Gulf Railway Companies, or either one of them, or
283 to any of the property, rights, or franchises mentioned in said petition, either under authority from the said Henry L. Newman or otherwise; and this defendant avers that he knows nothing as to what claims the said Newman may have to said property, but he does know and does aver that he, his associates, agents, employees, & those acting with him, have not, nor do they pretend to have, any claim, right, title, or interest in or to the said property in said petition mentioned or to any part thereof; and this defendant, further answering, avers that neither he, his associates, agents, employees, or those acting with him, have ever entered upon, taken possession of, or in any manner whatever interfered with any of the said property, rights, franchises, &c., mentioned in said petition, or any part thereof, nor have they threatened to, or do they intend to, do so now or at any other time.

Wherefore this defendant says he is not now and never has been guilty of any of the acts charged in said petition, and he now disclaims any and all intention of ever doing either or any of the said acts, and respectfully submits himself to the judgment of this honorable court as to whether or not he should be adjudged guilty of contempt of this court.

E. H. BROWN.

284 Subscribed and sworn to before me this 19th day of April, A. D. 1879.

GEO. W. McCRARY,
Circuit Judge.

Answer of Jas. I. Brooks.

In the Circuit Court of the United States, Eastern Division of the Western District of Missouri.

THE FARMERS' LOAN AND TRUST COMPANY
against
THE BURLINGTON AND SOUTHWESTERN RAILWAY COMPANY. } No. 1377.

And now, at this day, comes James I. Brooks, by his attorneys; and the said James I. Brooks now, and at all times hereafter, saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections contained in the rule to show cause issued herein January 2nd, A. D. 1880, and to the illegal manner in which said rule to show cause was made and issued, for answer to said rule or to so much thereof as said James I. Brooks is advised it is material or necessary for him to make answer to, answering, saith:

285 That he has no knowledge or information whether the said Elijah Smith, receiver, has, since his appointment as such receiver, or at any other time, had the control, custody, or possession of the railroad, rights of way, property, and franchises of what is and was known as the Lexington, Lake and Gulf Railway Company, consisting in part of a graded road-bed, extending from Lexington, in La Fayette county, to Butler, in Bates county, and southwardly, or any part thereof.

And said James I. Brooks denies that he has at any time attempted or is attempting in any manner to interfere with the possession of said receiver of said property or of any part thereof, or that he at any time has trespassed or that he is trespassing in any manner upon said property or any portion thereof, or that he has made or is making any efforts to occupy the same.

Wherefore said James I. Brooks prays that said rule be discharged and that he be hence dismissed without day, with his reasonable costs and charges in this behalf most wrongfully sustained.

JAMES I. BROOKS.

Subscribed and sworn to before me this 27th day of April, A. D. 1880.

[L. S.] JOHN G. STETSON,
Clerk U. S. Circuit Court, Mass. Dist.

286 *Report of Receiver.*

Report of Elijah Smith, receiver.

United States Circuit Court, District of Iowa. In Equity.

JOHN W. BROOKS and ALPHEUS HARDY
vs.
THE BURLINGTON & SOUTHWESTERN RAILWAY COMPANY *et al.* } No. 504.

Report.

And now comes Elijah Smith, receiver in the above cause, and respectfully submits the following as his final statement and report:

Earnings and expenses.

The total amount of earnings have been	1,042,524 46
Total expenses	1,059,468 54

Receipts and disbursements—operating ac.

Total receipts from operating the roads have been	1,292,338 11
Total disbursements	1,259,547 77

Receipts and disbursements—"gap."

	Receipts, being from sale of receiver's certificates	176,438 93
287	Amount expended for work on the gap	186,140 21

Making total receipts and disbursements, including the gap, as follows:

Receipts	1,468,777 04
Disbursements	1,445,687 98

The statement of earnings and expenses, as also of receipts and disbursements, embrace the whole period from the date of his taking possession, viz., October 16th, A. D. 1875, of the railroad and property to the time of its being sold under decrees of foreclosure issued by this court.

The main line in Iowa was sold November 27th, 1880, by William T. Love, special master.

The main line in Missouri was sold November 30th, 1880.

The branch line in Missouri was sold November 30th, 1880, both of the latter by H. Lacey, special master.

Monthly detailed statements have been regularly filed from time to time of the earnings and expenses, as well as of the receipts and disbursements, so far as the operating of the road for the whole period is concerned, and are now on file in this court.

These statements, with proper vouchers for all the pay-
288 ments made, have been examined and reported upon by P. T. Lomax, a special master for this purpose appointed by the court.

The statement of expenses includes the amount expended from time to time under instructions of the court for work on bridges, track repairs, right of way, &c., as well as for back taxes which were unpaid when the present receiver took possession, as well as current taxes to the time of the sale; also some back claims which were left unpaid by the former receiver, which had to be paid.

The amount expended for the construction of the gap, being an unfinished link of about (22) twenty-two miles of road in Sullivan county, was, as above shown to be, $186,140.21.

To provide means for doing this work the court authorized the issue of receiver's certificates of indebtedness, which were to be a prior lien upon the whole property, to bear not to exceed (8%) eight per cent. interest and the issue to be not over ($200,000) two hundred thousand dollars. Under this order and authority there were issued $174,800.00 certificates of indebtedness, dated July 1st, 1876, bearing interest at the rate of seven per cent. per annum and having five years to run.

289 There was realized from the sale of these certificates the sum of $176,438.93. They were sold at par, the difference between the amount of the certificates issued and cash received viz., $1,638.93, being for accrued interest collected from purchasers at the date of sale.

A detailed statement of the cost of constructing the gap has been filed in this court with report of H. Lacey's, special master's, report upon the same.

The balance of the receiver's certificates which were authorized and which were signed by the court will be returned to the court cancelled.

It was expected to receive upon the completion of the unfinished gap and to aid in paying for the same forty thousand ($40,000) dollars in the seven per cent. bonds of Sullivan county, Missouri, that being the balance of a subscription of $200,000 made on the 1st day of May, A. D. 1871, to aid in building the road through the said county.

The right to receive the bonds became a matter of considerable litigation.

Eighteen of the bonds were obtained by attaching creditors under suits pending in the State courts when the receiver was appointed.

290 Twenty-two of the bonds were ordered placed in the hands of H. C. Geisberg, the clerk of the U. S. circuit court for the western district of Missouri, pending the litigation as to the rights of the various parties in the matter. The record of the court for the western district shows fully the question involved, and it is not necessary to mention here.

The case was carried to the U. S. Supreme Court and decided adverse to the receiver.

No work was ever done or money raised under the order of the court authorizing the construction of about fourteen (14) miles of road between Pulaski, Davis county, Iowa, and Moulton, Appanoose county, Iowa, satisfactory terms having been made for continuing the use of the track of the North Missouri road (now Wabash, St.

Louis and Pacific, being a reduction from the terms of the contract price at the time the order to build was applied for).

In keeping the accounts and also in operating the road one set of accounts have been kept for the whole line. Although it has been in possession of two courts, Iowa and Missouri, the road in the two States has been operated as one entire line of railroad. This matter was fully considered at the time of taking possession, when the
291 two roads were disconnected, and also after the completion of the "gap," under orders of the court, and it was decided not wise or necessary to run the roads in Iowa or Missouri as separate properties or to keep two sets of accounts, which would have involved more trouble and more expense than the very light business of the road would warrant.

The relations of the two pieces of road as well as their ownership made it seem certain that they must after litigation had ended be purchased and owned as one road in one interest and become one consolidated road.

This has proved to be the fact, and had it been otherwise, and had any necessity occurred to make a separation of the accounts necessary, it could have been done with sufficient accuracy.

The regular monthly statement rendered from time to time, as well as the statements in this final report, embraces the operation of the whole line of road in both States of Iowa and Missouri, and have been filed in the courts of the respective States having charge of the property.

Assets and liabilities.

A statement of assets and liabilities, also filed herewith, showing—

	Assets	42,803 00
292	Liabilities	99,525 65
	Showing a deficit of	$56,722 65

This is in addition to the outstanding $174,800 receiver's certificates, which are assumed and will be provided for by the purchasers of the property.

The cash and other assets were turned over to the purchasers of the property, who organized a new company, which company has assumed and largely paid off the liabilities that are claims against the receiver or prior liens against the property.

There is, in addition to the above liabilities which are shown on the books of the company, a number of contingent liabilities, which have not yet become established, some being in litigation; some have been referred by the court to a master.

The largest and most important claim of this character is for taxes in the State of Missouri, which amount now to about ($25,000) twenty-five thousand dollars, without including the penalties.

The company has claimed to be exempt from all taxation in the State of Missouri under the provisions of the charter under which it built and operated its road in that State. This question is now

being litigated, and is at present in the United States Supreme
293 Court, where a favorable decision is expected.

A question has arisen about a portion of these taxes, viz., those for school and railroad purposes, as to their possibly not being included in or intended to — covered by the exemption in the charter referred to. In view of some decisions in connection with the Hannibal & St. Joseph Railroad Co., which company is operated under a similar charter, the school tax, amounting to $7,884.05, seven thousand eight hundred and eighty-four dollars and five cents, has been settled, the counties waiving the penalties and accepting the amount of the tax. Some discussion has been had about the matter of the railroad tax, but as yet no conclusion has been arrived at with regard to paying it. The amount of this tax is about $8,000.00, eight thousand dollars, without adding any penalties.

There is a claim for damages amounting, with interest, now to about $4,000.00, which was a judgment obtained in 1873 for killing a person named Hannamore before the road went into receiver's hands. An effort is being made to make the claim a prior lien under the Iowa statutes, although the accident took place and
294 judgment was recovered in Missouri. This case is also in the United States Supreme Court, where it went on a divided opinion from this court.

The other claims of importance are the claims of R. F. Hosford, $2,000.00; N. P. Sunderland, $2,582.20; and James Putman, $2,795.00, which are for salaries for services rendered the company some two years before the road went into the receiver's hands.

These claims have not been considered as liens against the property, and it is not believed that thay can possibly be sustained. They have been referred to P. T. Lomax, special master, and his report upon them will soon be made.

There is an old judgment obtained by one John Cross for $1,023.74. This judgment was got in August, 1874, but which is now being contested in the supreme court of the State of Iowa, and it is not thought the judgment will stand. There is a claim against receiver for some ties which, under the decree of sale, were ordered to be sold for the benefit of the claimants, but the claim is resisted on the ground that the ties were not found or used by the receiver. The case is now in the U. S. circuit court at Jefferson City; it
295 amounts to $1,318.00. There are two claims filed in the court at Jefferson City, one, by H. L. Newman, for $17,750, and the other, by Tilton Davis, for $5,000. These claims grew out of certain negotiations in connection with an old grade south of the Missouri river, known as the Lexington, Lake & Gulf R. R. An order of the court, at Jefferson city, was obtained on March 20th, 1880, with reference to an issue of receiver's certificates to build the road, and agreements were entered into with the said parties, Newman and Davis, by which they were to be paid out of the proceeds of such certificates or out of any earnings or proceeds of the sale of said road south of the Missouri river, but on no account to be any lien against any other part of the road or property. No road was ever built under said order, no money ever

received or earned on account of it, and no money ever came into the receiver's hands by reason of any sale of it, and nothing ever received by reason of said order of March 20th, 1880. The agreement and a report of the receiver's doings under said order has been filed in the circuit court for western district of Missouri, at Jefferson City, where the claims have been filed and where answers have been filed to the claims of the parties. There are some claims
296 pertaining to right of way and some old stock claims remaining unsettled.

It is not possible to give the amount of unadjusted right of way, but it is being ascertained as rapidly as possible, and will be settled for by the new company now in possession of the property.

The stock claims are few in number and not for a large amount—probably not in all to exceed $1,000—and efforts are being made to adjust and settle them as rapidly as possible by the new company.

In addition to the above are the trustees' expenses for foreclosure, which, with all the other claims herein mentioned, which are proper claims against the receiver for operating the road or which are prior liens against the property, are to be settled by the parties who purchased the property and organized the present company which is now operating the road.

There is also a claim of H. Martin for $114.65, which is in the hands of P. T. Lomax, special master, for report.

There is a claim for legal services for $106 — favor Trimble, Caruthers and Trimble, and an old claim — favor Lea and Beaman for $185, not yet settled.

297 ELIJAH SMITH,
Rec'r Burlington & Southwestern R'way.

Subscribed & sworn to by Elijah Smith, receiver, this 18th day of April, A. D. 1882.

[L. S.] H. B. SCOTT,
Notary Public.

Deposition of Elijah Smith.

Int. 1. What is your name, age, and place of residence?

Answer. Elijah Smith is my name. I am forty-two years old; my residence is in city of Boston.

Int. 2. Are you the Elijah Smith who was appointed receiver in this cause or not?

Answer. I am.

Int. 3. State if you were present at the master's sale of the Linneus Branch of the Burlington & Southwestern railway, on the 30th of November, 1880.

Answer. I was.

Int. 4. State whom you represented and what you did at that time.

298 Answer. I represented the bondholders of the Burlington & So'western Railway Company. I bid off the property for them, acting as their agent.

Int. 5. State whether your bid, as trustee, was for bonds or for cash and what your authority in the matter was.

Answer. My bid was for bonds; my authority was from the owners of the bonds.

Int. 6. State how said bid was paid off.

Answer. I understand the attorney for the trustees named in the mortgage arranged a settlement with the court. The bonds were placed in my hands for the trustees, to enable them to make the purchase, & are now subject to the order of the court.

Int. 7. State what money, if any, came into the hands of the receiver by reason of said sale.

Answer. None whatever.

Int. 8. State if any money was paid to the trustee by reason of the same.

299 Answer. No money was ever paid.

Int. 9. State what money, if any, ever came into the hands of the receiver from that part of the road lying south of Lexington, Missouri, known as the Lexington, Lake & Gulf railroad, in any way; and, if so, in what way.

Answer. None.

Int. 10. State if said Lexington, Lake and Gulf railroad was taken into consideration in the said purchase by you as trustee; and, if so, how.

Answer. It was not.

Int. 11. State if during the receivership any part of said Lexington, Lake & Gulf railroad was in any manner used, or if any revenues ever in any way arose therefrom.

Answer. No part was ever used, & no revenue was ever derived therefrom.

Int. 12. State if said sale was made strictly in accordance with the decree under which the master was acting, so far as you are aware.

300 Answer. It was.

Int. 13. State any other fact within your knowledge touching the matter in controversy, of interest to either party, as fully as if you had been specially and fully interrogated in reference thereto.

Answer. I know nothing further.

ELIJAH SMITH.

Decree Appointing Receiver & Authorizing Issue of Certificates.

Decree appointing Elijah Smith receiver & authorizing the issue of $200,000 certificates.

In the Circuit Court of the United States for the District of Missouri.

JOHN W. BROOKS and ALPHEUS HARDY

vs.

THE BURLINGTON & SOUTHWESTERN RAILWAY COMPANY *et al.*

and

THE FARMERS LOAN AND TRUST COMPANY

vs.

THE BURLINGTON & SOUTHWESTERN RAILWAY COMPANY *et al.*

301 Now come the plaintiffs, by their attorneys, Grant & Smith, and the defendants, The Burlington and Southwestern Railway Company, Orwine W. Potter, Geo. H. Wyman, T. C. Owen, & Samuel R. Mumford, executors of the estate of Eber B. Ward, deceased; J. W. Barnes, J. N. Martin, S. & J. C. Atlee, & John O. Smyth, by Owen, Smyth, Hall, Blake & Hedge, their attorneys, and, by consent of said parties, the following decree is made:

Gen'l N. B. Baker, a receiver appointed by the Federal court, having resigned, by the consent & approval of the parties, plaintiffs & defendants, Elijah Smith is appointed receiver of all the property of the Burlington & Southwestern Railway Company which is situated within the western district of Missouri, and all real & personal property, books, papers, vouchers, moneys, & accounts of said corporation; and said Elijah Smith presents his bond as such receiver, which is approved by the judge signing this order; and said receiver, Baker, & all persons having possession or control of any of the property of said corporation in Missouri or elsewhere under the control of this court are required to deliver the same to said Elijah
302 Smith. It is ordered and adjudged that Elijah Smith, the aforesaid receiver, is authorized & empowered to borrow any sum of money, not exceeding two hundred thousand dollars, to be a preferred lien on all the property of said railway company in Missouri over all creditors by judgment or mortgage lien, which sum of money, or so much of it as may be required, is to be expended by said receiver under the direction of this court, and all the accounts therefor to be audited & approved by one of the judges of this court, or a master to be appointed by one of said judges, in building, completing, & equipping the unfinished portion of said railway between Unionville & Laclede or Stanley City, in Missouri.

And said receiver is authorized to issue receiver's certificates of indebtedness or bonds, with interest, payable semi-annually, & run-

ning for a time not exceeding ten years, which said receiver's certificates or bonds may hereafter, by consent of the holders thereof, be exchanged for bonds or other securities of any corporation which may become the purchaser of said railway property on any sale thereof which may hereafter take place by order of this court.

And said receiver shall, within forty days from the date of
303 his appointment, prepare & file in this court a complete inventory of all the rent & personal property of said railway corporation, and of all the debts & obligations of said corporation in the order of liens or preference; and said receiver is required to protect, preserve, & use and operate said railway property for the benefit of the owners thereof and for public use, and it is ordered that he make to this court, on the 15th day of each month, or as soon thereafter as the accounts can be prepared, an account current of the receipts & operating expenses of said road and file the said account with the clerk thereof.

And he is also directed to make monthly reports of the expenditures in building, completing, & equipping the said unfinished part of the said road, and to keep the moneys borrowed by virtue hereof separate from money received from other sources.

And the said receiver is hereby authorized to pay all due and unpaid taxes now existing against said railway company, and to prosecute & defend all suits in law or in equity in which the interests of the property or parties are involved.

The certificates of indebtedness herein authorized to be
304 created are the certificates authorized to be issued by the circuit court of the United States for the district of Iowa, and there are to be only two hundred thousand dollars issued by the joint authority of both courts, and all of them are to be countersigned by the clerk of the circuit court of the United States for the district of Iowa, who is required to keep a registry of the same.

And the court also reserves to itself the right to adjust the equities of the application of the prior lien of two hundred thousand dollars hereby created between the main line and the branch of said railway should any difficulties hereafter arise, without, however, diminishing the security of the certificates hereby created.

And the rights of Wells, French & Co., claiming a mechanics' lien in the State of Missouri, are reserved and not to be affected by the lien herein created by reason of said certificates.

JOHN F. DILLON, *Judge.*

305 *Bill of Complaint in Case F. L. & T. Co. vs. B. & S. W. R'y Co. & Others.*

Receiver's evidence.

Circuit Court of the United (States) for the Western District *Court* of Missouri.

THE FARMERS' LOAN AND TRUST COMPANY

vs.

THE BURLINGTON & SOUTHWESTERN RAILWAY COMPANY, JOHN W. BROOKS, ALPHEUS HARDY, and JAMES F. JOY.

Bill in equity.

To the judges of the circuit court of the United States for the western district of Missouri:

The Farmers' Loan and Trust Company, a corporation for pecuniary profit created by and a citizen of the State of New York, brings this bill in equity against the Burlington and Southwestern Railway Company, a corporation for pecuniary profit created by and a citizen of the States of Missouri and Iowa, John W. Brooks and Alpheus Hardy, citizens of the State of Massachusetts, and James F. Joy and Eber B. Ward, citizens of the State of Michigan.

1. And the said plaintiffs complain that the said Burlington and Southwestern Railway Company, owning a line of railroad,
306 partly constructed, extending from Burlington, in the State of Iowa, to or north of St. Joseph, in the State of Missouri, and being desirous of building a branch of said road, called the Linneus Branch of the Burlington and Southwestern Railway Company, did, on the first day of April, A. D. 1872, execute and deliver to the said plaintiffs, The Farmers' Loan and Trust Company of the City of New York, a deed of trust or mortgage, which the plaintiffs are ready to show to the court and a copy of which is annexed to this bill, to secure bonds, which it thereafter executed and delivered, to the extent of twenty thousand dollars per mile of road built, principal and interest payable in gold.

And said deed of trust did grant, bargain, sell, and convey to the said plaintiffs all the present and in future to be acquired property of or in any manner pertaining to the said Linneus Branch of the Burlington and Southwestern Railway Company, and all the right, title, interest, and equity of redemption therein, whether of said company or the stockholders of the said branch, included the premises leased of the Lexington, Lake and Gulf Railroad Company, now made and to be constructed, extending from the main line of said Burlington and Southwestern railway at or near Union-
307 ville, in the county of Putnam, in the State of Missouri, by the way of Linneus and Lexington to Kansas City, and by way of said line of leased premises from Lexington to Butler, in Bates county, Missouri, and to such other point in Southwestern Missouri as may be determined upon by the board of directors, or however said branch line of road, including said leased premises,

may be described or built, including the right of way therefor, roadbed, superstructure, iron, ties, chairs, splices, bolts, nuts, spikes, and all the land and depot grounds, station-houses, depots, viaducts, bridges, timber, and materials and property purchased and to be purchased or otherwise acquired for the construction and maintenance of said branch railroad, and all engines, tenders, cars, and machinery, and all kinds of rolling stock now owned or to be thereafter purchased by said party of the first part for and on account of said branch railroad; all the revenue and income of said Linneus Branch, and all the rights, privileges, and franchises relating thereto and properly acquired by virtue thereof, now in possession or thereafter to be acquired, including machine shops, tools, implements,
and personal property of every kind acquired by said Bur-
308 lington and Southwestern Railway Company by virtue of its
lease of said Lexington, Lake and Gulf Railroad, and which branch line of road and leased premises extending from the said town of Unionville by the way of Linneus and Lexington to Kansas City and Southwestern Missouri, as before set forth, was & is known and designated as the Linneus Branch of the Burlington and Southwestern Railway Company:

To have and to hold said premises and every part thereof, and appurtenances, to said Farmers' Loan & Trust Company of the City of New York and its successors in trust or assigns upon the following express trust: That if said Burlington and Southwestern Railway Company should fail to pay or cause to be paid the principal or any part thereof or any of the interest on any of the bonds secured or intended to be secured thereby at any time when and where the same might become due and payable according to the terms thereof, and for sixty days thereafter, all of said bonds, both principal and interest, should become due and payable at the option of the holder, and at the request of the holders of one-tenth of said bonds then unpaid and outstanding said trustee and its successors or assigns might enter and take possession of all the mortgaged property and as attor-
neys-in-fact or agents of the grantors have, use, and employ the
309 same, making needful repairs and additions, & after deducting expenses pay the balance of the proceeds *pro rata* among the bondholders; or the said trustees, at their discretion, might and on the written request of one-tenth of the holders of said bonds unpaid should cause said premises to be sold at public auction at the city of St. Louis, in said State of Missouri, giving sixty days' notice thereof by publish- the same at least once a week for eight successive weeks in two of the principal newspapers published in Boston and New York and one published in St. Louis, Missouri, and one in Burlington, Iowa, and upon such sale to execute and deliver a deed sufficient to convey the title to said property and bar the equity of redemption of the defendants; and, after deducting expenses and costs and a reasonable compensation to the trustees and indemnity for liability as trustee, to apply the proceeds of the sale in payment of interest and principal of the bonds and any surplus to the grantors.

The said trust mortgage was duly recorded in the various counties of Missouri through which said branch road ran. About ten miles

of said branch is completed and a large amount of work is done on the same; that one million five hundred thousand dollars
310 of said bonds, payable on 1st April, 1897, in sums of one thousand dollars each, numbered from one to fifteen hundred, have been issued, payable to bearer, with interest payable in gold coin of the United States at 7 per cent., free of Government tax, with coupons for said interest payable, free of Government tax or duty, at the company's agency in New York or London, on presentation of the coupons, interest payable on the first days of April and October in each year.

And said defendants neglected to pay the interest due on said bonds to the amount of one million five hundred thousand dollars on the first day of April, 1873, and each instalment of interest since that date, and at least one-tenth of the holders have elected to hold the principal & interest of said bonds due and payable, and by the terms of said bonds and said deed of trust the whole of said principal and interest has become due & payable and remains unpaid for more than sixty days.

2. The plaintiff avers that the said Brooks, Hardy & Joy claim some interest in the premises mortgaged or some part thereof by reason of a first mortgage on the main line of said road; that the whole of said branch, finished and unfinished, is within the
311 said circuit; that only about ten miles of said branch is completed and in operation, and a large amount of work has been done on the unfinished portion thereof; that said Eber B. Ward is in the actual possession of said branch, using and operating the same, under some claim of title subsequent to the title of the plaintiffs; that said corporation has become insolvent and unable to pay its debts; that there is now due to the plaintiffs, as trustees under said mortgage, the sum of one and a half million dollars, with interest at seven per cent, all in gold coin, from the 1st April, 1873; that said defendants ought to pay said sum which is due under said deed of trust or mortgage for principal and interest or release the equity of redemption in the premises, which they refuse to do.

All which is contrary to equity.

To the end, therefor-, that said defendants may, if they can, show why your petitioners should not have the relief prayed, and may full answers make to all the allegations of this bill, but not under oath, which is waived, your petitioners pray for a writ of subpœna in chancery, to be issued out of this court directed to said defendants, commanding them to appear and answer this bill on a day named in said subpœna, that an account may be taken of what is
312 due and owing to the plaintiffs, as trustees, for said bondholders under said mortgage or trust deed for both principal and interest; that the defendants may be decreed to pay the same, in gold, together with costs, by a short day to be appointed by the court for that purpose, your petitioners being ready and willing on such payment to release & reconvey said property by proper deed; and in default of payment of said debt, interest, & costs by said day, that the defendants and all others claiming under them be barred and foreclosed of their equity of redemption, and said mort-

gaged premises be sold by a special master to be appointed by this court and the proceeds applied to payment of said debt, and such other relief as the plaintiff's case may require.

GRANT & SMITH, *Solicitors.*
J. F. TRACY, *Of Counsel for Pl'ff.*

Mortgage.

For mortgage attached to the foregoing bill in equity see page 93 of this transcript.

Decree of Foreclosure.

Decree of foreclosure, dated May 19th, 1876, for which see page 120 of this transcript.

Deposition of E. Smith.

Deposition of Elijah Smith, for which see page 297 of this
313 transcript.

Report of Master.

Report of H. Lacey, special master, for which see page 171 of this transcript.

Deposition of Harry Lacey.

Interrogatory 1. What is your name, age, and place of residence?

Answer. Harry Lacey; age, 30 years; residence, Sioux Falls, Minnehaha county, Dakota Territory.

Interrogatory 2nd. What had you to do, if anything, with the sale of the Linneus Branch of the Burlington & Southwestern Railway on the 30th of November, 1880?

Answer. I sold the same under decree of foreclosure by virtue of an appointment as master in chancery of the United States circuit court for the western district of Missouri at the time mentioned in the interrogatory.

Interrogatory 3rd. State who were present at said sale, and what, if anything, was said about that part of the line known as
314 the Lexington, Lake and Gulf Railroad south of Lexington.

Answer. Present at time of sale were Elijah Smith, receiver of the Burlington and Southwestern Railway; John W. Smith, general superintendent of that road; P. Henry Smyth, attorney for the said receiver, and some 30 or 40 others, whose names I disremember and are unknown to me; there was conversation concerning the sale of the Linneus Branch of the Burlington and Southwestern railway, known as the Lexington, Lake and Gulf Railroad, south of Lexington; my impression is that only that portion of the Linneus Branch was sold which at that time had been constructed, but having neither a copy of the master's deed or report I am unable to say certainly; by reference to them the matter can be settled definitely.

Interrogatory 4th. State if any money was bid for the property which you then sold, or whether the bid was for mortgage bonds.

Answer. The bid was made in mortgage bonds of the Linneus Branch of the Burlington and Southwestern Railroad Company; no money bid.

315 Interrogatory 5th. State if any money was paid into your hands as the result of said bids. If so, what amount, and what disposition of it, if any, was paid?

Answer. There was no money paid into my hands at said sale as the result of said bid or at any other time.

Interrogatory 6th. State if any money arising from that sale was ever paid into the hands of the receiver. If so, how much and by whom?

Answer. There was no money paid to the receiver arising from said sale.

Interrogatory 7th. State any other matter or thing within your knowledge touching said matters of interest to either party as fully as if you had been specially interrogated in reference thereto.

Answer. I know nothing more of interest to either party.

HARRY LACEY.

Appointment of Rec'r, &c.

Decree appointing Elijah Smith receiver & authorizing the issue of rec'r's certificates, for which see page 300 of this transcript.

316 *Certificate of Clerk of S. Dist. of Iowa.*

Certificate of clerk U. S. circuit court, central division, southern district of Iowa, in reference to certificates issued & returned & cancelled.

United States Circuit Court, Central Division, Southern District of Iowa.

JOHN W. BROOKS and ALPHEUS HARDY, Trustees, &c., *vs.* BURLINGTON AND SOUTHWESTERN RAILWAY COMPANY. } Eq. No. 504.

I, E. R. Mason, clerk of said court, do hereby certify that in the above-entitled cause the receiver's certificates were issued under the order of court entered on the 16th day of October, 1875, as follows:

Nos. 1 to 150, inclusive, $1,000 each $150,000

Payable July 1, 1881, int. 7%; 10 coupons attached to each bond for $35.00 each.

Nos. 151 to 200, inclusive, $500.00 each $25,000

Payable July 1, 1881., int. 7%; 10 coupons attached to each bond for $17.50 each.

Nos. 201 to 400, inclusive, $100.00 each $20,000

Payable July 1, 1881, int. 7%; 10 coupons attached to each bond for $3.50 each.

Nos. 401 to 500, inclusive, $50.00 each 5,000

317 Payable July 1, 1881, int. 7 %; 10 coupons attached to each bond for $1.75 each.

I further certify that the following certificates have been returned, cancelled, and filed in my office, to wit: Nos. 1 to 150, inclusive, $1,000 each; Nos. 151 to 200, inclusive, $500 each; Nos. 201 to 400, inclusive, $100 each; Nos. 401 to 500, inclusive, $50 each. The coupons attached to each of said certificates when issued have not been returned or filed in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at Des Moines, in said district, this 25th day of November, A. D. 1882.

[L. S.] E. R. MASON,
Clerk U. S. Cir. Court, Cent. Div., S. Dist. Iowa.

Final Report of Receiver.

In Circuit Court United States, Western District of Missouri.

FARMERS' LOAN AND TRUST COMPANY
vs.
THE BURLINGTON AND SOUTHWESTERN RAILWAY COMPANY and Others. } Equity, 297.

318 Report of receiver.

And now comes Elijah Smith, receiver, and reports that on November 30th, 1880, the railroad of defendant, Burlington & Southwestern Railway Company, was sold under order of this court by H. Lacey, master, to a trustee for the bondholders, who organized a corporation to which said road was conveyed; that the sale was confirmed by this court, and thereafter the said road was no longer operated by the receiver, who surrendered the same to the purchaser on or about the t-irtieth day of November, 1880.

That said road was sold, subject to existing incumbrances, prior to the mortgage, and that the purchasers thereof have since said sale paid and returned to the receiver the certificates or debentures issued upon an order made in this cause in circuit court for Iowa and this court; that your receiver has filed regular statements of his doings in said circuit court for Iowa, which have been examined and passed upon by a master in chancery in said Iowa court, except the final report which is now in the hands of said master for examination; that all of the receiver's reports, except said final
319 one, have been approved by said master, and his findings have been confirmed by the court; that said reports include all of the transactions of the receiver for and concerning the property in his hands in this State, as well as in Iowa, the same having been kept as one account.

That all of the receiver's accounts and transactions have been settled up to and including said last report, and that there is

now no property in the hands of the receiver which he received under his appointment herein, and there is no reason why said receivership should longer be continued.

That inasmuch as all of his accounts have been filed and submitted to the said circuit court in Iowa and submitted and passed upon by a master of that court, there is no reason why such accounts should be re-examined by a master of this court.

That no certificates have ever been issued or sold under the order of this court made in reference to that part of the property acquired from the Lexington, Lake and Gulf Railroad Company. Your receiver therefore respectfully shows and prays that as there is no longer anything in his hands, neither money nor other
320 assets, and no duty for him to perform, that he be discharged from further duty or liability by reason of his appointment, and that his doings as reported be approved.

ELIJAH SMITH,
Receiver Burlington & Southwestern Railway.

Subscribed and sworn to this second day of December, A. D. 1882, before me—

[L. S.]

JULIUS BINGE,
Notary Public 169, *N. Y. C.*

321 UNITED STATES OF AMERICA, } *sct:*
Eastern Division of the Western District of Missouri, }

I, Henry C. Geisberg, clerk of the circuit court of the United States in and for said district, do hereby certify that the foregoing writing is a true transcript of the record and proceedings in case No. 297, Farmers' Loan & Trust Co. of New York *versus* Burlington & Southwestern Railway Co. *et al.*, in the matter of the intervening petition of H. L. Newman, trustee, &c., *versus* Elijah Smith, receiver, &c., as fully as the same remain on file and of record in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at office, in the city of Jefferson, in said district, this 10th day of June, 1885.

{ Seal of the United States Circuit Court for the Western District of Missouri, Eastern Division. }

H. C. GEISBERG, *Clerk.*

[Endorsed:] No. ——. U. S. circuit court, western district of Missouri, eastern division. —— —— *vs.* —— ——. Duly certified copy of the —— —— in the above-entitled cause.

Endorsed on cover: W. Missouri C. C. U. S. No. 253. The Farmers' Loan & Trust Company and Elijah Smith, receiver and trustee, appellants, *vs.* Henry L. Newman, trustee. Filed July 23d, 1885.

127-649

127-649

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1887.

No. 253.

THE FARMERS LOAN & TRUST CO., ELIJAH SMITH, RECEIVER AND TRUSTEE, *APPELLANTS*,

VS.

HENRY L. NEWMAN, INTERVENOR, *APPELLEE*.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

P. HENRY SMYTH, FOR APPELLANTS.

ACRES, BLACKMAR & CO., Printers, Burlington, Iowa.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 253.

THE FARMERS LOAN & TRUST CO., ELIJAH SMITH, RECEIVER AND TRUSTEE, *APPELLANTS*,

VS.

HENRY L. NEWMAN, INTERVENOR, *APPELLEE*.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

P. HENRY SMYTH, FOR APPELLANTS.

Facts upon which contention arises in this case, are (as shown by pleadings and proofs contained in record) as follows:

Prior to 1871 the Burlington & Southwestern Railway Company, a corporation of Iowa, was constructing a railroad from Burlington, in Iowa, in a southwesterly direction toward the Missouri state line. They acquired by purchase, under a statute

of Missouri, the charter of the St. Joseph & Iowa Railroad Company, which was organized to construct a road from St. Joseph, Mo., in a northeasterly direction to the Iowa state line (see marked on diagram main line B. & S. W.) Prior to the purchase, the St. Joseph & Iowa Company had projected a branch line, under a Missouri statute, diverging, at a place called Unionville, from the main line, and running southwardly to La Clede on the Hannibal & St. Joseph Railroad, and on to such point as the directors might determine. This branch was, when projected, called the Central North Missouri Branch of the St. Joseph & Iowa Railroad. Its name was afterwards changed to that of the Linneus Branch of the Burlington and Southwestern Railway. The Lexington, Lake & Gulf Railroad Company was a company which was trying to build a road commencing at Lexington, on the Missouri river, and extending southwardly through several of the Missouri counties, being in the same general line as the branch line before named (as shown on a diagram annexed, for convenience).

On the 7th day of February, 1872, said last named railroad company made an agreement of lease (p. 32, pr. record) with the Burlington & Southwestern, whereby it leased its road and franchises to said Burlington & Southwestern Railway Co., for and in behalf of its Linneus Branch, for one thousand years (p. 42, pr. record). This lease is partly set out at page 32, pr. record, and more fully referred to in the mortgage on page 42, pr. record. It was provided in said agreement that there existed an indebtedness of said Lexington, Lake & Gulf Railroad Co. of some fifteen thousand ($15,000) dollars, which it was agreed should be paid out of certain uncollected subscriptions theretofore taken to said road (p. 34, pr. record). The following diagram shows the various lines of road referred to:

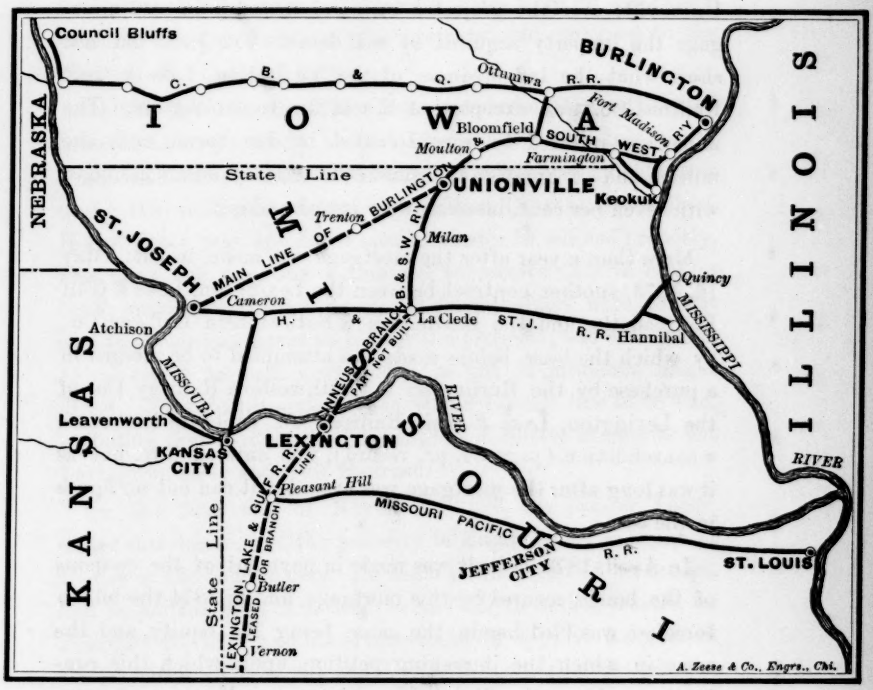

DIAGRAM OF MAIN LINE AND BRANCH REFERRED TO.

On April 1st, 1872, the Burlington & Southwestern Railway Co., for and in behalf of its Linneus Branch, executed to the Farmers Loan & Trust Company, of New York, a mortgage to secure bonds upon the entire branch line extending from Unionville over the projected line, and included in said mortgage the property acquired by said lease. The lease did not show what the indebtedness of the Lexington, Lake & Gulf Railroad Co. was, except that it was due to contractors. The mortgage referred to was executed in due form, and one million and six hundred thousand ($1,600,000) dollars in bonds, with seven per cent. interest, were issued under it.

More than a year after the mortgage was made, to-wit: May 16, 1873, another contract between the Lexington, Lake & Gulf Railroad Co. and the Burlington & Sothwestern Railway Co., by which the lease before made was attempted to be merged in a purchase by the Burlington & Southwestern Railway Co. of the Lexington, Lake & Gulf Railroad Co., called in the record a consolidation (page 34, pr. record), was entered into, but as it was long after the mortgage was executed it can cut no figure in the case.

In April, 1873, default was made in payment of the coupons of the bonds, secured by this mortgage, and in 1874 the bill to foreclose was filed herein, the cause being 297, equity, and the same in which the itervening petition, upon which this contention arises, was filed. *The intervenor, Newman, trustee, was not a party to the proceedings in any way until he filed his intervening petition, April 18, 1881* (page 2, pr. record).

At the filing of the original bill General Baker was appointed receiver, but soon after resigned, and Elijah Smith was appointed (p, 127, pr. record). There was a portion of unfinished road lying between Unionville and La Clede, and the receiver was authorized

in the order of his appointment to borrow two hundred thousand ($200,000) dollars to finish the same. A portion of this was borrowed, and the road completed to La Clede. The certificates were partly outstanding at date of sale, which was made subject to all prior liens. These certificates were all afterwards paid by the purchasers of the property, and returned to the receiver, who canceled them.

At the April term, 1876 (five years before the petition of intervention was filed), a final foreclosure decree in favor of complainant was passed and enrolled, adjudging an indebtedness under the mortgage of over two million ($2,000,000) dollars. Harry Lacey was appointed special master to sell the property, and upon the sale was authorized to receive bids in cash or *bonds secured by the mortgage.* The bondholders were authorized to appoint an agent to bid for the property, and afterwards to convey it to such corporation as the bondholders might direct. This decree ordered the whole branch line to be sold, including that part south of Lexington, formerly known as the Lexington, Lake and Gulf Railroad.

On the 30th day of November, 1880, the master Lacey, under this decree, sold the property to Elijah Smith as agent or trustee of the bondholders. He made a full report of his doings, and submitted with it a deed to said Elijah Smith, trustee, on February 26, 1881, and asked the court to approve his acts in the premises. The report and deed both recite that the sale was for one million ($1,000,000) dollars in bonds (p. 72, pr. record). Pending the action of the court upon this report, and nearly two months after it was filed, to-wit: March 7th, 1881, the intervenors appeared upon the scene, and filed their "interpleas," so called, before referred to (p. 2, pr. record). They did not then or afterwards file any exceptions to the report of this special master of the sale and deed to Smith, trustee.

It becomes necessary, now, to go back and refer to the facts upon which this intervention is based. In 1879, the receiver, deeming it advantageous to the parties' interest, undertook to complete the construction of the road south from Lexington, acquired from the Lexington, Lake & Gulf Railroad Company, and made application to the court for authority to issue receivers' certificates and to borrow money thereon for said purpose. "Said certificates to be and constitute a first lien upon that "portion of said line and no other, and not to constitute any "indebtedness against any other portion of the property in- "cluded in the decree of foreclosure, except upon said line south "of Lexington and such addition thereto as may be made by "the receiver with funds arising from said loan" (p. 63, pr. record). The necessity for this action was more fully set out in an amended application (p. 65, pr. record). Upon this application the court made an order authorizing the receiver to borrow five hundred thousand ($500,000) dollars for the purpose named, and to issue certificates, and it was decreed "that such "certificates, or debentures, shall be a lien for the principal and "interest, prior to all other liens or claims whatsoever, upon "*that portion of railroad before mentioned, to-wit: that portion* "*of the road which was formerly the Lexington, Lake & Gulf* "*Railroad*, * * *but upon no other property or funds in the* "*possession of said receiver.*"

About this time the receiver was confronted with the claim of the intervenor, who claimed to have purchased the entire property at a trustee's sale, alleged to have been made by one Chapman, trustee, about August, 1877, and while said property was still in the custody of the United States Circuit Court, through the receiver (p. 60, pr. record). It was claimed that this sale was made under a deed of trust made by the Lexington, Lake & Gulf Railroad Co., of date January 16, 1872, which was

prior to the lease named and the mortgage. This complicated the situation, and the receiver at once proceeded to file a bill on the equity side of the circuit court, to enjoin the said Henry L. Newman and others, from interfering with the property, claiming that no adverse right to the property could be acquired, while the property was in the custody of the court, in any proceeding not authorized by the court, and a temporary writ of injunction was allowed by Judge McCrary, December 24, 1879 (p. 115, 116, pr. record). Pending this controversy between the receiver and Newman, and in settlement of it, this agreement set up by the intervenor was made, March 12, 1880 (p. 4, pr. record) By this agreement Newman agreed to deliver a deed in escrow, conveying to Smith, receiver, all his interest in the property of the Lexington, Lake & Gulf Railroad before named, and to release all claims and demands against said Lexington, Lake & Gulf Railroad Co., so as to substitute the trustee to all rights held by Newman; said deed to be delivered to said receiver upon his compliance with the agreement. The agreement on the part of the receiver, quoted and condensed, is as follows (p. 5, pr. record):

"And in consideration of the premises, said party of the first part, as "receiver, agrees to pay said Newman, out of the moneys coming into his "hands from that part of said railroad hereinbefore mentioned, or from "the sale of receiver's certificates lately authorized by said court to be "issued by said receiver, or from any earnings from that portion of said "road, or arising from the sale thereof under the decree of said court, and "within nine months from November 18, 1874, seventeen thousand seven "hundred and fifty ($17,750) dollars, it being admitted that the claim of "said Newman is a first and prior lien upon said portion of said rail-"road, paramount to the mortgage to said Farmers Loan and Trust Co., "*but this agreement is not to bind the receiver in reference to any other* "*property or money coming into his hands except from, or pertaining to,* "*that part of the property aforesaid acquired from the Lexington, Lake &* "*Gulf Railroad Co.*"

"It is agreed that time is of the essence of this contract, and in case "said second party fails to comply, said first party may have the same "enforced specifically by the court in which said cause is pending, or, at his "option, declare the agreement void. And if said first party shall fail to "pay as agreed, said second party may apply to the court for the enforcement "hereof, or, at his option, abrogate and abandon this contract, and his "rights, in that event, shall be the same as if the contract had not been "made."

"And it is distinctly understood that this agreement is made by said "receiver *under an order of said court and refers to no other than said "property before mentioned, and is to be paid out of no funds except such "as arise from said portion of said road*, and is to constitute no personal "or individual claim against said Elijah Smith."

Newman delivered the deed in escrow, but the receiver failed utterly in his undertaking to borrow the money and construct the road south from Lexington; no certificates whatever were issued or sold under the order of the court authorizing the same, before referred to. The intervening petition was filed to enforce this agreement, and after reciting the foregoing facts, it proceeds:

"Said money is still unpaid; said receiver is seeking to have "said sale and purchase confirmed and approved by the court, "and wherefore complainant intervenes and demands that said "contract be enforced, and that *before any order be made con-"firming, etc.*, that said receiver be *ordered* and *required* to pay "out of the proceeds of said sale so made, etc., said sum of "seventeen thousand seven hundred and fifty ($17,750) dollars "and interest, and for such other and further relief as to the "court shall seem proper (p. 7, pr. record)."

It will be seen that the intervenor's chief relief prayed for was that the court should not confirm the sale made by Lacey, master, until an order was made on the receiver requiring him to pay plaintiff's claim, and not until that was done.

In the meantime the report of the master remained on file, unexcepted to, asking the court to confirm his doings, and on

the 5th day of July, 1881, while the intervening petition was pending, the circuit judge, Hon. Geo. W. McCrary, on motion of the complainants in original bill, passed a decree confirming the sale and doings of the master, and ordered the deed to be delivered to Elijah Smith, trustee, and that the property be placed in his possession as trustee for the bondholders, the purchasers. The last clause of said decree is as follows:

"But the said deed of conveyance, and the delivery of said property, "shall not be taken to affect any claim, right, interest, or lien upon or to "said property sold and conveyed by said master's deed, now pending in "this court, or in any state court, by leave of this court, but that said "claim, right, interest or lien are hereby reserved subject to further order "of this court, and the power to make further orders, decrees and direc- "tions in reference to said property is hereby expressly reserved by the "court" (p. 80, pr. record).

Under this decree the property was turned over to the purchasers, and finally to a corporation known as the Kansas City, St. Joseph & Burlington Railway Co., duly organized by the bondholders for this purpose (p. 106 pr. record) The receiver made a final report, showing that no property remained and no money came into his hands, and asked for a discharge (p. 134, pr. record).

No money was realized by the sale of the master, but the entire consideration was paid in bonds. Nothing whatever came into the hands of the receiver by reason of the sale, and he never received any money from that part of the road south of Lexington; it was never built, and no money whatever was realized from either source mentioned in the agreement between the receiver and Newman (pp. 125, 132, pr. record).

By the answer of the Farmers Loan & Trust Co., and Elijah Smith, receiver, it was admitted that the claim of intervenor was a valid lien on the property acquired from the Lexington, Lake & Gulf Railroad Co. prior to the mortgage of the

Farmers Loan and Trust Co., and his right to have the same established and enforced against that property was not contradicted or opposed, but the claim for an order on the receiver for payment, or any relief except the enforcement against said property, was resisted by the receiver and the original complainant, the Farmers Loan & Trust Co.

The circuit court entered a decree November 28, 1884, finding the indebtedness, and that the property was sold under the foreclosure decree, the sale conditionally confirmed, and then provides as follows: "That said claim not having been paid or "provided for, said sale of said railroad and property sold as "aforesaid, as well as the confirmation thereof, is hereby set aside "and for naught held, and said receiver of this court is hereby "ordered to take exclusive possession of said railroad and prop-"erty, with any additions and appurtenances thereto absolutely "necessary to regain his original possession of all said property, "in all things the same and with all the powers in him as "said receiver heretofore vested, at and upon the expiration "of ninety (90) days from the date of this decree, unless within "the last named period of ninety days, the claim of said inter-"venor in the sum hereinbefore determined, be paid with "interest, and the costs of this proceeding, by said Elijah Smith, "as trustee for purchasers."

From this decree the Farmers Loan & Trust Co. and Elijah Smith, receiver and trustee purchaser at foreclosure sale, prayed an appeal to this court, which was allowed in open court. A citation was also served.

The questions here involved are whether, under these pleadings and proofs, the court below was justified in passing the decree set out, setting aside the sale and the confirmation made by the court, and requiring the receiver to re-possess himself of the

whole property of the branch line south of Unionville, thereby undoing all the work and expense of the sale and transfer to the mortgagees under previous order of the court, and setting aside the title granted and conveyed by the special master at the direction of the court, unless E. Smith, trustee, should within ninety days pay off intervenor's claim, which, as appellants contend, was no lien on any of the property but that part of the road south of Lexington, and no claim against the receiver, and the legal effect of which is a judgment and decree against the trustee, and through him the owners of the property, and which they must pay or surrender their property to the control of the court?

POINTS AND AUTHORITIES.

First. The claim set up by the intervenor Newman, was a lien on the property of the Lexington, Lake & Gulf Railroad Company, prior to the mortgage to the Farmers Loan & Trust Company. And when the bill was filed to foreclose, he was not made a party, and was not a party when the decree of foreclosure was passed, nor when the sale was made by the trustee. The effect of this was that the purchasers took that portion of the property subject to intervenor's lien. The decree and sale in no manner affected intervenor's rights, upon the well settled principle that no court can enter a decree affecting the rights of any one not a party.

It follows that in making the sale and reporting it, it was not the duty of the court or the master to take any notice of intervenor's claim. The sale was not for his benefit, and, as made, was only a purchase by the mortgagees for a certain sum to be credited

on the mortgage debt. The agreement made with the receiver put intervenor in no better position in this respect. The order of the court under which this agreement was made, specially provided that the receiver should not incumber any portion of the property except that part of the road south of Lexington, and it was expressly stipulated in the agreement with Newman, that "it "refers to no property except this, and is to be paid out of no funds "except such as arise from said portion of said road" (p. 6, pr. record). And the payments stipulated for are to be made out of moneys coming into the receiver's hands from sale of certificates, or from operating that part of road, or arising from the sale thereof (p. 5), it being conceded that said claim of intervenor was a first lien on that property. There is nothing in this agreement which imposed the least duty upon the mortgagees to pay in any money on their purchase, to pay off this first lien; they took subject to it, and must either submit to lose it on a foreclosure of the first lien, or pay it off to protect their title; but between these two alternatives they have their option. And it seems plain to us it was error in the court to hold that because they did not see proper to pay in money to pay off the prior lien, that therefore the sale to them should be set aside, and their property placed again in the hands of the receiver, unless within ninety days their trustee, or they, should elect to pay said claims.

The most that can be said in favor of the claim of the intervenor is, that it is a prior lien upon the road south of Lexington, to that of the mortgage; and that inasmuch as he was not a party to the foreclosure, his rights remain unaffected by either the decree or sale. It was the right of the Farmers Loan & Trust Company to foreclose without making him a party, and to have the sale made subject to his prior claim.

Jerome *vs* McCarter, 94 U. S., 736.

This being true, it was not the duty of the court to provide for him in the decree, nor of the master to notice his claim in any way; and he would have no right to come in afterwards and disturb what had been done because he was not so provided for. As before stated, the agreement with the receiver did not change the rights of intervenor in these respects. But the effect of that agreement was, that the receiver conceded Newman's claim to be a prior lien on the property to the mortgage; that the receiver would pay the amount in one of three ways: first, from the sale of the debentures; second, from earnings of that part of the road; third, from money arising from the sale of that part of the road under the decree. It was clearly within the contemplation of the parties, that if no money should be realized from any of these sources, that then intervenor's remedy was to proceed and foreclose his first lien; and that he was entirely willing to take the risk of the receiver's failure. For it is not only specially provided in the order authorizing the receiver to make this agreement, but in the agreement itself, that *no other property in the hands of the receiver, and no money arisiny from any other property*, should be liable for this claim. And as it is made to appear no money was realized from this property in any way, the only thing left to intervenor was to proceed against it; and the contract gave him no right to have an order on the receiver, or the trustee for mortgagees, to pay the amount, on pain of having the whole sale set aside, and the title of the other property disturbed, which had already by order of the court passed to the mortgagees. While this decree is not exactly in form a judgment *in personam* against Smith, as trustee for the mortgagees, or against the mortgagees themselves, nor a clear adjudication that the intervenor's claim is a lien upon the finished part of the road from Unionville to La Clede, yet it is so made as to have that effect.

Wabash & Erie Canal *vs.* Beers, 1 Black, page 54.

Burnham vs Bowen, 111 U. S. 749

The decree here requires the money to be paid to intervenor within ninety days by the trustee of the mortgagees, and not only warns him that measures will be taken to compel obedience, but provides absolutely that if it is not done, that their property shall all be taken into the custody of the court, and their title extinguished. Of course such an order could only be based on the assumption that it was the duty of the trustee, or his beneficiaries, to pay the claim; and an order or judgment, with provision for enforcement thereof, by so stringent a remedy as this decree prescribes, is to all intents and purposes, in its effects, an adjudication that the mortgagees are legally indebted in the sum so adjudged to the intervenor, and a judgment *in personam* against them; and that not only the property named in the agreement is liable, but that the claim is a lien upon all the property which the receiver is ordered to take possession of, because it is not consistent with any other theory. Therefore it must follow that if in fact the mortgagees are not liable personally, and that the property other than that described in the agreement is not subject to the lien of intervenor's claim, the decree is erroneous, and should be reversed.

It would be difficult to find a principle, we think, within the whole range of our equity jurisprudence, that even tends to support the proposition that a junior mortgagee, by the act of taking his mortgage and foreclosing it, and buying the equity of redemption of the mortgagor, would thereby assume and become personally liable to pay any prior incumbrance; and if such a principle should be discovered, it would be safe to predict that from that time on, second mortgagees would be equally difficult to find.

We had supposed that a second mortgagee never, under any state of the law, subjected himself to any greater hardship than was inflicted by the ancient doctrine of tacking, by which it

seems that the holder of the first mortgage could purchase in a third, and that a court of equity, by tacking the first and third together, would knock or squeeze the second mortgage out of existence. We do not remember that even under this severe doctrine, it was ever held that the second mortgagee had become personally responsible, or that the mortgage liens could be extended so as to affect any other property which he owned. It is also perfectly clear that the receiver, acting under order of the court, could not bind personally the mortgagees, or any other party, any more than he could the court, whose officer he is; and it is furthermore expressly stipulated that the agreement shall not constitute any personal claim against him. The only value of a receiver's contract consists in its being a lien on the property in his hands, and if it is not paid by reason of the non-receipt of funds by the receiver, the only remedy of the holder is to have his lien on the property enforced by an order of sale of such property as is subject to the lien; and this may be done as well *after* a sale under the junior lien, and *after* the property has been *turned over* to the *purchaser*, and even *after* the the receiver has been *discharged*, as before. His presence is in no way necessary to the relief. When the court has reserved to itself the right to make all necessary orders in regard to such liens, the remedy is easy and complete.

Farmers Loan & Trust Company *vs.* Central Railroad of Iowa, 2 McCrary, 181.

In the case cited the question as to what the remedies were under contracts made, and torts committed by a receiver in the discharge of his duties, was exhaustively examined and ably discussed by Judge Love, in an opinion in which the Circuit Judge McCrary concurred. It was there held to be fundamental that no action would lie against a receiver individually upon a contract made in his official capacity.

"In this respect (says the court, page 182,) receivers are like public offi-
"cers who are not individually responsible upon their official contracts, nor
"for torts committed by their subordinates, but only for torts committed
"by themselves, or contracts in which they assume to bind themselves
"personally."

"It is therefore obvious that suits against receivers are really and sub-
"stantially suits against the fund or property of which they are custodians."

The court also in that case distinctly held that the receiver could not be treated as the agent of any body, neither the old company, whose effects he held by order of the court, nor the new purchaser, who holds the property by virtue of a sale under the decree. The court uses this language (page 183):

"It is needless to say that in all these respects there is a radical differ-
"ence between the character and legal functions of an agent, and a receiver
"appointed by a court of equity. To make a railway company responsible
"for the acts and contracts of an officer whom they can neither appoint nor
"control, direct nor remove, would be to violate the fundamental principles
"of the law of agency. If no action could be maintained upon the torts or
"contracts of the receiver, against the old railway company, *a fortiori*,
"none could be supported against the new or purchasing company. Doubt-
"less if the claimant had a legal or established equitable *lien* against the
"property, he could enforce it by a proper proceeding at law or in equity,
"in any court of competent jurisdiction."

The learned court then proceeds to point out the remedy, to which the holder of a claim entitled to be made a lien, may resort (page 184):

"It is not necessary that the claimant should make new parties. He
"intervenes in the old case, asserts his right to a lien upon the property
"which the court turned over with a reservation of a jurisdiction to hear
"and determine his cause."

"It is competent then for the court, if the plaintiff is by law entitled to
"a lien, to establish the same against the property, to fix a time for pay-
"ment, and in default, a proper order of sale will be awarded."

Vilas no Page, 106 N. Y. Page 484

If the doctrine here announced be sound (as it unquestionably is), no support can be found for such a decree as the one in this

case. There is not a single intimation of the court that in any event it could be necessary, or even proper, in enforcing a claim arising under an agreement with a receiver, to set aside the sale and compel the receiver to re-possess himself of the property which the court had regularly turned over to the purchaser. The agreement with the receiver here showed, and it was conceded by the pleadings, that the claim of intervenor was a first and prior lien upon that part of the property named in it; that he was entitled to an order for its sale, according to the principles laid down in the case cited, and to such order there was no opposition. There is no room, under the agreement, to contend that the claim of intervenor is a lien on any other property. The contract especially stipulates otherwise, and the order of appointment limits the power of the receiver to that, in making his agreements and issuing his certificates. There is nothing in the agreement of the parties, or in the circumstances of the case, which can be construed as even tending to give any right to intervenor to a lien on any thing except the property named. This being true, how can a decree be sustained which requires the purchaser to pay the debt, or, in default thereof, that all the *other property*, including sixty miles of finished and operated road between Unionville and La Clede, with its rolling stock and appurtenances, shall be wrested from its owners and placed under the control of the receiver and the court?

No authority is quoted, and we think none can be found to support the idea that a court cannot discharge a receiver and surrender the property while a receiver's contract is outstanding. Receivers often issue debentures running several years, which are a lien and an ample security; but the fact that they are not due, and are outstanding, affords no reason for withholding the property from the purchasers, and keeping it in control of the court.

Burnham vs Bowen, 111 U. S. 776

Second. The decree is erroneous in another view; one which shows that the intervenor shifted his grounds of complaint after his petition was filed, to-wit: The relief granted is not prayed for in the bill, and is not consistent with the case made by the bill.

1 Daniel's Chancery Practice, 5 Am. Ed, page 381.
Casady *vs.* Woodbury county, 13 Iowa, page 120.
Hayward *vs.* National Bank, 96 U. S., page 615.

The decree does not follow the prayer for specific relief, and cannot be granted under the prayer for general relief. The specific prayer for relief was, that the sale be not confirmed by the court, and for an order on the *receiver* to pay the amount due on the contract. This was the theory of the bill. How can you extract from either the bill or the specific prayer for relief, the idea that at the hearing a decree would be asked setting aside the decree of confirmation (which was passed after the intervenor's bill was filed), and also the sale itself, and an order requiring the trustee of the bondholders (instead of receiver) to pay the claim? All of these things are inconsistent with the case made by the bill of intervenor. It is a well settled rule that a party "cannot desert the specific relief prayed, and under the "general prayer ask specific relief of another description, unless "the facts charged will maintain that relief."

1 Daniel's Chancery Practice, 5 Am. Ed., page 380.

It is as clear as mathematics, that no such thing as setting aside the confirmation and sale, or an order of payment on any one (except the receiver) had entered the mind of the pleader when he was drafting the bill filed by the intervenor. "The "whole frame and structure of the same is inconsistent with the "right to the relief" provided for in the decree; fully as much so as was the case in Hayward *vs* Bank, 96 U. S., 614, where the

above quoted language was used by Justice Harlan in delivering the opinion of the court. To the point also we cite:

Story's Equity Pleading, section 40;
Kerr on Injunctions, page 619.
Shields vs Barrow, 17 Howard 141

It will be well to remember that the decree of confirmation, and order on the receiver to turn over the property, was made *after* the intervening petition was filed, so that it is conclusive without argument that an order setting it aside was not contemplated by the pleader, and could not therefore be supposed to be included in the prayer for general relief. The truth is, that the validity of the final decree of confirmation was no where assailed, by any pleading whatever. It could not be by the bill, as it had not been made; there was no supplemental bill, motion, or exception of any kind touching it, and it stood executed and unimpeached until the decree here appealed from eliminated it from the record. But,

Third. Independent of these considerations, and leaving the form of the bill out of view, we maintain that the court below erred in setting aside the confirmation decree for other solid and satisfactory reasons, to-wit: The intervenor made himself a party to the record by filing his petition, or "inter-plea," by leave of the court, on the 7th day of March, 1881, after the sale by the master, and while the report of that sale was on file, with a deed to the purchaser, asking that the master's doings be confirmed and approved; that he be authorized to deliver the deed, and the receiver the property to the purchaser. One object sought by the petition was to prevent this from being done (no exceptions were filed, however, as required by rule 83) *; but the court,

*RULE 83.—In equity, that part applicable is as follows: "The master "as soon as his report is ready, shall return the same into the clerk's office, "and the day of return shall be entered by the clerk in the order book. "The parties shall have one month from the time of filing the report, to "file exceptions thereto; and if no exceptions are within that period filed "by either party, the report shall stand confirmed on the next rule day after "the month is expired."

notwithstanding this prayer, and with it in view, and in opposition to it, on the 5th day of July, 1881, passed and caused to be duly enrolled the confirmation decree, thereby ordering a surrender of the title and possession of the property to the purchaser, reserving simply the right to control it for the purpose of enforcing any valid liens which were found to be entitled to priority to the mortgage upon any portion of the property. It must follow, logically, that the court in passing this decree, determined judicially that the intervenor had no right to obstruct or delay a confirmation decree; and for the very conclusive and pursuasive reason that such a decree would in no manner affect any right which they were entitled to; and further, that by rule 83 the report stood approved, no exceptions having been taken. His right to any lien, and to have it properly enforced, was fully preserved, and the court held and decided that this was all they could ask or require. Is it not fairly reasonable, then, for us to claim that if there was no reason why the court should not allow and pass the confirmation decree when it did, that certainly there was no reason and no right to set it aside, and to order the receiver, after three years had elapsed, to re-possess himself of the property, as against those who had acted on the faith of this decree, and assumed the expense and responsibility of re-organizing, repairing, extending and operating the railway? Is it not equally conclusive that this decree of confirmation, and order to surrender the property, was an adjudication of all questions touching the propriety of the decree itself, and a complete bar to any right to have its correctness inquired into, or to have it in any manner set aside or interfered with subsequently; especially when no ground is alleged except such as is contained in the pleadings which were on file and considered by the court when the decree was allowed? The whole matter became "*res adjudicata*," and binding on intervenor as much as upon any other party to the record, also upon the court.

Sibbald *vs.* U. S., 12 Pet., 491.

"Whatever was before the court, and is disposed of, is consid-
"ered as finally settled."

There was nothing in the reservation made by the court in the decree, which could be construed into a retention by the court of the power or right to reverse or set aside the decree itself, or to grant any thing inconsistent with it. The only effect of the reservation was that the court might afterwards establish and enforce any prior liens against the property, under the doctrine laid down in Farmers Loan & Trust Company *vs.* Central Railroad Company, 2 McCrary, 181.

There is still another forcible reason why the decree appealed from is in this respect erroneous. The decree of confirmation was passed on the 5th day of July, 1881, being a continuation of the April term of the Circuit Court. No motion was ever made at any time to set it aside, nor any pleading ever filed assailing it in any way. We think it was not competent for the court at the November term, 1884, more than three years after the decree was entered, and after it had been executed and carried out, to set it aside. We think the court had no more power to set aside the confirmation decree, as it has done, than it had to set aside the original decree of foreclosure entered and enrolled at the April term, 1876.

The recital in the decree here appealed from, that the decree of confirmation, passed July 5th, 1881, by Judge McCrary, was a *conditional* one, is a clear misapprehension of the character of that decree; the recital is surplusage, and of no force, under rule 86, which forbids recitals.* There is nothing conditional about the confirmation decree, except that the property was

*RULE 86.—"In drawing up decrees and orders, neither the bill nor "answer, nor other pleadings, nor any part thereof, nor the report of any "master, nor any other prior proceeding, shall be recited or stated in the "decree or order," etc.

passed by it, subject to any prior liens, in the matters named. It was a final and complete determination that the sale and deed to Smith, trustee, and all the doings of the master, should be approved, and the property delivered to the purchaser, and the control of the court surrendered. It was a final determination of that part of the inter-plea which prayed that the sale be not confirmed until intervenor was paid; and it was a judgment against intervenor on that point, and forever settled that question. The parties had a right to act upon that decree; the master to deliver the deed, as he did, and thereby to pass the title to the purchaser; the receiver to surrender his possession, which he did, to the real owners; the purchasers to go on, assume control, complete their new organization and proceed with their business, relying upon this question having been finally determined. They were chargeable with notice only of the fact that if any pending claim should be adjudged to be a lien prior to the mortgage, upon any portion of the property, that they could, by the reservation of the decree be compelled to either pay off such lien, or suffer their title to be cut off and destroyed by a sale of such portion of the property as was subject to the lien. The reservation in the decree goes no farther than this; and it seems quite clear that there was no power in the court, under the circumstances, to overturn this decree, and thus destroy the foundation of the important and valuable rights which were built upon it; and this more than three years, or six terms after the decree was passed.

It seems to be pretty well settled, under our system of jurisprudence, that neither courts of law or equity have power to set aside their solemn judgments and decrees at a term subsequent to that at which they are rendered and passed, unless the right to do so is preserved by motion or otherwise.

Cameron *vs.* McRoberts, 3 Wheat., page 591.
McMicken *vs.* Perrin, 18 How., page 511.
Bank *vs.* Moss, 6 How., page 38.
Sibbald *vs.* United States, 12 Pet., pages 488–92.
Bronson *vs.* Schulter, 104 U. S., page 415.
Schell *vs.* Dodge, 107 U. S., page 630.
Philips *vs.* Negley, 117 U. S., page 665.

This case last cited was a writ of error from an order of the court setting aside a former decree, and in many respects similar to the one at bar.

We think the decree of confirmation, with approval of the doings of the special master, the order to pass both the title and the possession of the property to the purchasers, subject only to such liens as might be established under the reservation, was such a final decree as comes within the principles announced and adhered to in the foregoing cases. As between the original parties it was a determination of the litigation; it was the last and only decree necessary to be made to dispose of the entire case as between them; it ended all controversy and carried both the property and the parties out of court. The reservation was for the benefit of collateral parties, and to protect any interest they might establish. The language of the reservation goes no farther. No *power* was reserved by the court to *reverse or vacate* its own decree, or to recall the parties and repossess itself of the property and the title to it, as if no decree had been made. There was no intention on the part of the court in the reservation to leave a way open for any of the parties to object to the decree itself at a later term for error in passing it, or to raise any question as to whether it should remain in force or not. The reservation for one expressed purpose left no power in the court to set aside the decree for another. The court could not exercise appellate power over its own decree. If when it was passed the

intervenor was dissatisfied with it, he should have objected to it in some legal way, and have brought his objections to the mind of the court, and to the notice of the other parties. He did not do this, but now, after the decree is executed, the property surrendered, and the purchasers have been in possession more than three years, upon a final hearing of the claim of the intervenor's right to a lien as set up in his petition, with one stroke of the judicial pen, every right acquired under the sale and the decree of confirmation is swept away, and "the sale as well as the confirmation for *naught held.*" Can it be that the court could properly do this? Is there any equitable principle which would require those acting under this decree of the court, to be prepared for its revocation, and for a surrender of every thing which they took under it; and not only that, but a surrender of all acquisitions and improvements made after they became clothed with the title. Are not the parties who purchased (even if it be conceded that the present owners are the original mortgagees) in just as good a position to be protected as if some third party had purchased and taken the property under these proceedings? And upon what reasonable theory can it be claimed, that in such case, because some prior lien on some part of the property was not paid, that they would take subject to the power of the court, years afterwards, to undo all that had been done, and strip them of their title, as well as the possession of the property, and thereby be required to re-enter the market as purchasers, at some new sale to be ordered. We feel sure this action can find no principle to support it, and that the decree in setting aside the sale and confirmation was erroneous, and should be reversed.

Fourth. From what has been said, we think there is no room for contending that the contract of the receiver constitutes any personal claims whatever against any one. It is equally clear,

it seems, that it constitutes no lien on any portion of the property, except that part named in the contract itself, to-wit: the road south of Lexington. The petition of Newman refers to the order of the court authorizing the receiver to borrow money (page 3, printed record,) and quotes a *part* of said record. The apparent object of the quotation is to make it appear that the court intended to give the receiver a general authority to "settle and adjust" any outstanding liens on the property referred to in the order, and to charge such claim upon the whole property. That such was not the intention, is shown clearly by the order itself. The whole order must be construed together, and we have quoted (on page 6 of this brief) from that order to show that the receiver was not authorized to encumber any other property in his hands than that part south of Lexington, an express qualification being, "but upon no other property or "funds in possession of said receiver." It would be an unreasonable construction to hold that the court, in making the concluding clause, intended to depart from the whole tenor and purpose of the order, and give the receiver power in carrying forward the project, to encumber the other property. Such a construction would not only be in opposition to the order of the court, but also in conflict with the understanding of the parties at the time, as embodied in the agreement (see page 7 of this brief). They supposed the restrictions imposed by the court upon the receiver extended and applied to this very transaction; for these very restrictions were contained in the agreement, and it was stipulated that it referred to this, and no other property, and was to be paid out of this alone. So it is plainly the meaning of the contract that it was to be a claim or lien alone upon this property. The very object of the order of the court, of the consent of the parties, and the contract with Newman, was, that in case the enterprise of constructing this part of the road

should fail, and any liabilities should be incurred in the effort of the receiver, that such failure should not entangle or encumber any other property in the hands of the receiver. No one knew more fully the effect of this order than the intervenor, and his agreement shows that he was only too willing to assume the hazard of its failure; and there is no fact in the record which relieves him of the obligation to stand by his agreement in this respect, or that gives him any shadow of equitable right to have his claim established as a lien on any other property, or to have any compulsory order made upon the receiver to pay to him funds which the receiver himself has never had in his possession; and so far as the decree below undertakes to do any of these things we claim it is erroneous.

Some reference is made in the record, and in the opinion of the court below, to the fact that in 1879 Smith, the receiver, while in the custody of the property, made application by a bill in equity to restrain certain parties (among whom was intervenor) from interfering with this property (page 115 printed record). There is nothing to show that he did any thing more than his duty as receiver required him to do. A receiver who would allow outside parties to assume control of property entrusted to him, without any effort to protect his own possession, would be very remiss in his duty. But this proceeding was in 1879, and before the agreement upon which this proceeding is based was made; and all of the previous controversies and contentions were merged in this agreement; and the agreement of March 12th, 1880, which the intervenor has made the basis of his petition, must measure the rights of the parties; and according to that the intervenor was not entitled to the relief which the decree below undertook to give, and to no part of it. The receiver at commencement of this proceeding was still in court; but it was shown, both by his evidence and his

final report, that he had neither property or money in his hands applicable to the payment of this (or for that matter any other) claim; that long before the decree herein was passed he had fully executed his trust; that in 1882 he filed a final report of his doings (page 134 printed record); that no exception of any kind was ever filed by any of the parties to this report, by reason whereof, under the rules of the court, the same stands approved (Rule 83). From these records it is evident that the court had no power to order the receiver to pay any thing, as he only represented the court as its officer, and the court having ordered him to surrender all property, and he having done so, and performed his trust, was entitled to be discharged and released from further duty, instead of being required to repossess himself of the whole estate and enter anew upon the responsible duties of such a position.

We submit that the decree appealed from should be reversed.

P. HENRY SMYTH,
For Appellants.

27-649

27-649

Office Supreme Court U. S.
FILED
APR 13 1888
JAMES H. McKENNEY
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 253.

FARMERS' LOAN & TRUST CO. AND ELIJAH SMITH, RECEIVER AND TRUSTEE,
Appellants,
vs.
HENRY L. NEWMAN, TRUSTEE,
Appellee.

STATEMENT, BRIEF OF POINTS AND AUTHORITIES, AND ARGUMENT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

JOHN W. NOBLE,
JOHN C. ORRICK AND
TILTON DAVIS,
Solicitors for Appellee.

LEVISON & BLYTHE STATIONERY CO., ST. LOUIS.

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 253.

FARMERS' LOAN & TRUST CO. AND ELIJAH SMITH, RECEIVER AND TRUSTEE,
Appellants,
vs.
HENRY L. NEWMAN, TRUSTEE,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

APPELLEE'S STATEMENT.

The appellee, Henry L. Newman, in this proceeding acts for himself and as trustee for John W. Waddell.

The appellee's claim is, that under an agreement dated March 12th, 1880—(see Transcript of Record, page 81; Original Record, 193),—made between the appellee and the appellant Elijah Smith, receiver, under authority of the court, the appellee became entitled to the sum of $17,750, payable out of the proceeds of sale of the road made under the decree of foreclosure; and that the sale

having been made without regard to this obligation of the court. and no money having been provided by the parties in interest to satisfy the claim, the court was bound, as it did, to set the sale aside and order a resale so that its debt might be satisfied.

This view the appellants resist, and have brought the matter here on appeal.

The following statement is made with close reference to the record; and will develop the subject matter, the parties in interest, and the jurisdiction of the court to proceed as it has done.

There were originally two railroad companies in Missouri, with power to build, own and operate their respective roads. One of them was the Lexington, Lake & Gulf Railroad Company, a corporation of Missouri, whose road was to extend from Lexington, Missouri, on the south side of the Missouri river, southwardly to the southern border of the State; and the other was the Burlington & Southwestern Railway Company, a corporation of Missouri and Iowa, whose road was to extend from Iowa through a part of Missouri to Unionville, a town in Missouri, some distance north of the Missouri river, with a branch by way of Linneus to Lexington, a distance of about one hundred miles, and thence to Kansas City and Southwestern Missouri. This branch was styled the "Linneus Branch" of the Burlington & Southwestern Railroad. This branch had not been constructed, in fact but very little work done thereon at the time the mortgage for $1,000,000 was made as hereinafter mentioned. The Lexington, Lake & Gulf Railroad Company, however,

had expended large sums of money and incurred heavy liabilities in the construction of its road, the bed of which had been made and the most of which had been tied and bridged from Lexington southward for about ninety miles. This portion of the road had cost about $600,000—page 105 (221). Among the creditors of the company was the firm of Monroe & Company, contractors for building the road, to whom, for labor done and materials furnished, the company had given its note to the amount of over $10,000; and this was secured by a deed of trust on the road, dated January 17th, 1872. —page 86 (204). On February 7th, 1872, while this debt and mortgage were in force, the Lexington, Lake & Gulf Railway Company leased its property to the Burlington & Southwestern Railway Company, acting for and on behalf of the Linneus Branch, and so as to make the leased line and the Linneus Branch for the purposes of the mortgage and deed of trust to be placed thereon, and stock to be issued, one line of road and one common property—page 33 (74-75)—; and the whole was to be known as the "Linneus Branch." This lease also bound the Burlington & Southwestern Railway Company to iron within five months and complete the road as soon as practicable—page 33 (75 *a*); and the lease was subject to the contractor's lien above mentioned—page 34 (75 *b*.)

Afterwards, May 16th, 1873, the two companies were consolidated, and in the articles of consolidation the Burlington & Southwestern Railway Company assumed the liabilities of the Lexington, Lake & Gulf Railway Company of $20,000—page 38 (85)—and agreed that the

work of laying the iron southward from the river on the original line of the Lexington, Lake & Gulf Railway should commence, and said ironing and work of completing said part of said road last mentioned progress —page 36 (81-82)—and that it, the Burlington & Southwestern, would continue to prosecute the work in good faith, and complete the same and run its cars to the town of Butler and the southern terminus of said line of the road as soon as practicable after and as the means necessary thereto should be realized by a sale of the mortgage bonds placed upon the road of said second party or otherwise—page 37 (82). Thus by this lease and these articles of consolidation, the Lexington, Lake & Gulf Railroad Company was merged and became known by the name of "Linneus Branch of the Burlington & Southwestern Railway Company," and the whole road north of the Missouri river at Lexington to Unionville, and south thereof to the southern boundary of Missouri, became one road, and the whole was to be known as the "Linneus Branch of the Burlington and Southwestern Railway." They were made one property and line of road with one common stock and one franchise; and the property as an entirety was to be conveyed and included in one common mortgage. This was the origin of the $1,600,000 bonds and mortgage that were foreclosed in the proceedings wherein this claim arose. This mortgage or deed of trust was executed by the Burlington & Southwestern Railroad Company for and in behalf of its said Linneus Branch, dated April 1st, 1872, to the Farmers' Loan & Trust Company of New York, to secure $1,600,000 in bonds of

$1,000 each—page 41 (93). The deed of trust owned by Newman was dated January 16th, 1872—p. 56 (133)—and prior to the lease and articles of consolidation or mortgage of Burlington & Southwestern Railway Company.

In the lease, as we have seen, was recited the fact, that there was a certain lien upon the property of the Lexington, Lake & Gulf Railroad for work done and materials furnished by the contractor, and that the Burlington & Southwestern Railway Company took that property subject to the incumbrances therein recited, which, as the evidence shows, included the Newman note and mortgage. Full notice of this prior lien claim was thus given in the source of title on which the mortgage rested.

It further was known at the time these bonds were issued, that the ninety miles of the Lexington, Lake & Gulf Railroad were graded, bridged and tied at a cost of about $600,000; and that substantially no work had been done at that time upon the road north of the river. For the whole $1,600,000 bonds, the only security at the time existing was that portion of the road south of the river. Elijah Smith was then president of the Burlington & Southwestern—page 40 (91).

As time passed, there was a total disregard, by the consolidated company, of the provisions both of the lease and the articles of consolidation, and a perversion of the funds placed in the hands of the Burlington & Southwestern Company. The whole of the bonds were used and employed to build and iron that part of the road north of the river, whereby a great advantage was

obtained over the property south of the river, while nothing was placed on the southern part out of the proceeds of the mortgage bonds, either before or after the property went into the hands of the receiver—see pages 99, 237, 100, 101, 239 and 240. After the execution of the mortgage by the Burlington & Southwestern, as the facts above stated show, there were two mortgages on the property formerly of the Lexington, Lake & Gulf Railway Company; that to Monroe & Company, afterwards assigned to Newman, and the main mortgage for $1,600,000; and as it appears, this prior mortgage not only existed as a lien under the laws of Missouri superior to that of the Burlington & Southwestern mortgage, but the debt had been assumed to be paid by the Burlington & Southwestern Railway Company under the terms of the articles of consolidation above recited. Newman having become the owner of the note, and failing to get his money when due, foreclosed his deed of trust according to its terms, and in pursuance of the power of sale therein contained, without suit. This sale was made February 20th, 1876, by the trustee, and Newman thus acquired the old Lexington, Lake & Gulf Road —p. 60 (144.) After the suit for foreclosure was brought on the $1,600,000, in 1876, and Smith had been appointed receiver, Newman had found an opportunity to sell his title to the road, which Mr. Elijah Smith, receiver, learned, and in the foreclosure suit, filed a petition for an injunction against Newman—page 115 (274)—and on this application, Newman was enjoined from setting up any claim or interfering with the possession of the

receiver to the property named, and his sale was thus defeated by the action of Smith. There was an answer by two of the defendants who denied that they had done anything to warrant the application. This was in December, 1879—page 117 (277)—and having got out his injunction and thus broken up Newman's sale, immediately afterwards Mr. Smith, the receiver, applied to the court for authority for himself to purchase Newman's claim. In his petition for this purpose, he states—page 64 (153)—"That a portion of the property coming into his custody and control as receiver, is a line of railroad partly constructed extending from Lexington, in Lafayette County, Missouri, to the town of Butler in the County of Bates, being a portion of the property acquired by contract with the Lexington, Lake & Gulf Railroad Company; that said road is graded and bridged nearly the entire distance from Lexington to Butler, a distance of eighty-two miles; that said work was done some years ago and is depreciating in value; that said portion of road, if completed, will be of great value to the parties in interest, and the circumstances are such that it is important that said portion of road should be completed at once and before the sale and confirmation under the decree in this case can be had; that by reason of the contract with said Lexington, Lake & Gulf Railway Company, the statutes of the State of Missouri requiring railroads to be completed within a certain time, and that said road bed and bridges are rapidly going to decay, *and the field threatened to be occupied by a rival line which will destroy the value of*

said property, it is important that said road should be ironed and equipped for traffic at once, to protect, preserve and save said property to the parties in interest."

Besides asking in this petition for authority to borrow $300,000, the petitioner adds—page 65 (156)—that he asks for authority to settle and adjust by payment or purchase any claims against said Lexington, Lake & Gulf Railroad Company which may *seem to be prior to* or adverse to the claim of the Burlington & Southwestern Railway Company under the contract by which said Lexington, Lake & Gulf Railway Company was acquired. The amended petition goes further in the same direction—page 65-6 (157)—and asks for $500,000 to equip this road; and after stating that the $1,600,000 mortgage is far in excess of the value of the road, states that there is no interest of the Lexington, Lake & Gulf Railway Company which can in any manner be affected by the order, and that the only *real parties in interest* whose rights are to be affected, are the *bondholders under the Linneus Branch mortgage*, executed to the Farmers' Loan & Trust Company. The petition states that it is greatly to the interest of the parties that the road should be built at once; that it extends into a most valuable coal deposit or throughout a fruitful country, and if lost will be greatly to the damage and injury of the parties in interest; and that there is no other legal way by which it can be accomplished; and that any delay will cause a loss to the parties in interest upon which, *as it is stated, over $600,000 has been expended.*

Mr. Smith's solicitor, Mr. Smyth, signed this petition, and the Receiver, Smith, swore to it. Notice was given, and the Burlington & Southwestern Railway Company, by Elijah Smith, acknowledged service—page 64 (152)—as also did the Farmers' Loan & Trust Company—page 64 (152). Judge McCrary, at Chambers, on January 26th, 1880, authorized the order upon the consent of *two-thirds of the bondholders*—page 67 (161). The Farmers' Loan & Trust Company assented to the order, and admitted in its answer the matters set up and asked in the petition—page 67 (161)—as did also more than two-thirds of the bondholders; 1,300 bonds out of the 1,600 assented—pages 68-69. Mr. Elijah Smith signed as a bondholder, but did not state the number of his bonds. They may have been the other 300. Upon this, we may say unanimous consent of all the real parties in interest, the court made the order, of which the following is part—page 71 (171):

"And the said receiver is further authorized and directed to settle and adjust, by payment or otherwise, any outstanding claims against the Lexington, Lake & Gulf Railway Company, which may seem to be prior in right to the claims of the Burlington & Southwestern Railway Company under the contract before mentioned; and to purchase in any outstanding or adverse lien or title to any portion or all of said property, upon such terms as he may deem for the interest of the parties concerned, any right or title so acquired to be conveyed to him as receiver for the benefit of the parties in interest herein."

The date of this order was March 3d, 1880—page 70, (166 foot.) The agreement made between the receiver and Newman, pursuant to this order, will be found on page 81 (192), made March 12th, 1880, whereby it was agreed in short, that Newman was to convey to the receiver, by quit-claim deed, his title in and to the railroad formerly known as the Lexington, Lake & Gulf Railway, extending southwardly from the Missouri river at Lexington, Missouri, by the way of Pleasant Hill, to a point south of Butler, in Bates county, Missouri, which deed was to be made within twenty days from the date of the agreement, and placed in the hands of John W. Noble, in escrow, and delivered to the receiver upon compliance with the terms of the agreement on his part; which were that the receiver would pay Newman out of the money coming into his hands from that part of the railroad mentioned, or upon a sale of the receiver's certificates *lately authorized* by the court, or from any earnings of that portion of the road, or arising from a sale thereof under decree of the court and within nine months from the 18th day of December, 1879, the sum of $17,750, it being recognized, as the agreement stated, that the claim of Newman to the above amount was a first and prior lien upon that portion of the road paramount to the mortgage of the Farmers' Loan & Trust Company—page 82 (195). The agreement was not to bind the receiver, in reference to any other property or money coming into his hands, except from or pertaining to that property mentioned. The agreement then stated it was to be in the nature of a compromise of all outstanding differences, and it was

further provided, that time was of the essence of the contract; that in case Newman failed to comply, on his part, the receiver might have the right to have the same enforced specifically by the court in which said cause is pending, or, at his option, declare the agreement null and void; and "if said first party (the receiver) should fail, within nine months from December 18th, 1879, to pay said $17,750, said second party (Newman) might apply to the court for the enforcement thereof, or at his option he might abrogate or abandon the same absolutely, and his rights in that event should be the same as if this contract had not been made."

It was further provided that the agreement was made under an order of the court, and referred to no other than the property named, and was to be paid out of no funds except such as should arise from that portion of the road, and was to constitute no personal claim against Elijah Smith.

It was further agreed that when the quit-claim deed was delivered to Noble, that the note mentioned and described in a deed of trust to Moses Chapman, under which Newman's claim arises, should be delivered to Noble, in escrow; and that said trust deed should also be delivered to him, if in possession of the parties; if not, as soon as practicable; and on compliance upon the part of the receiver, the note and the trust deed should be delivered to him as muniments of his title and as vouchers; said note to be cancelled upon the payment of said $17,750.

It appears by the testimony—pages 91-2 (215-220)—that the quit-claim deed was duly made as required—page

83 (198)—and the note and the deed of trust under which Newman's title arose, were placed in the hands of Noble, in escrow, to be held in escrow as provided in the agreement for payment. Mr. Newman awaited the receiver's action, anticipating that upon sale of the property under the foreclosure sale, the means of paying this claim would be realized and applied.

It is to be observed at this point that the decree of foreclosure under which this road was sold was entered in this cause as early as May 19th, 1876—page 51 (121), page 132 (312); but the sale did not take place until November 30th, 1880,—page 72 (172); that at this sale the premises were struck off and sold to Elijah Smith, of Boston, Mass., for $1,000,000 in Linneus Branch bonds, said Smith being the highest and best bidder for the property—page 73 (175); that the sale was made to Smith as trustee, and was without valuation or appraisement, and subject to certain receiver's certificates, issued by Elijah Smith, by virtue of an order of court, not to exceed in amount $200,000. The report further shows—page 74 (177)—that the Master was informed by the receiver, Mr. Smith, that there were no funds on hand at the date of the sale over and above the amount necessary to operate the road; he further reports that the entire expense of advertising the sale was $135, bills for which were presented to and were paid by Elijah Smith, whether in his capacity as receiver or trustee or individually is not stated; and, that the Master had made a deed to the purchaser's trustee.

It may be remarked here that none of these receiver's certificates ever came into the hands of Newman, but were a set of certificates issued before the contract with Newman was made.

After the sale, March 7th, 1881—page 2 (2)—Mr. Newman filed his petition in the foreclosure suit, claiming his right under his contract and requesting the court to make provision for his payment. The quit-claim deed, note and mortgage were placed in the custody of the court for the benefit of the receiver. Pending this application of Newman, the court confirmed the report of the foreclosure sale, but in confirming the report of the sale—page 80 (190)—July 5th, 1881, the court inserted the following proviso: "But the said deed of conveyance, and the delivery of said property to said grantee, shall not be taken to affect any claim, right, interest in or lien upon or to said property sold and conveyed by said Master's deed now pending in this court or in any State court by leave of this court, but that said claim, right, interest or lien are hereby reserved subject to the further order and decrees of this court, and the power to make further orders, decrees and directions in reference to said property in this cause is hereby expressly reserved by the court.

Newman's interplea, filed March 7th, 1881, was thus especially included in this order as a claim and lien pending in the court—page 2 (2).

The interplea or petition was answered in due form by both the Farmers' Loan & Trust Company, the complainant in the foreclosure suit, and Elijah Smith re-

ceiver—page 15 (29)—and to which replication was made.

The answer did not controvert the claim of Newman as a first and prior lien, or the jurisdiction of the court to establish it in this proceeding and order a sale of the road—page 16 (35)—but denied the right to order payment by the receiver or trustee.

The answer set up the following statement as a defense—page 15 (32).

"It is also true that at said sale Elijah Smith, acting as agent for the trustees, complainants herein, and for the bondholders, did at said sale purchase the said property of said branch line, and the same was conveyed to him as trustee, for and in behalf of the owners of the bonds aforesaid; all of which property included in the said mortgage was sold by said Master and purchased by said Smith as aforesaid, but the bid therefore was payable in the bonds secured by said mortgage as authorized in said decree; but complainants say that said bid was made solely with a view to the value of the finished portion of said road upon which the money realized from said bonds was expended, and with the knowledge that whatever title said purchaser would take under said sale would be subject to the lien of said Newman under his said trust deed; that no part of said bid was to be paid or was paid in cash, and that said bid was made in satisfaction of said mortgage debt *pro tanto*, and was paid to the Master in acknowledgment of satisfaction to the extent thereof of the said debt due to the trustees by reason of said mortgage; that there was no money bid for said property and

none paid over to said Master and none required to be; that at the time said decree was entered in 1876, the said Newman was not a party to said foreclosure proceedings, nor had his claim in any manner been presented to this court or adjudicated as a lien, and there was no order to sell said property in satisfaction thereof, so that the said Smith at said sale simply took said property for his beneficiaries, the bondholders, subject to such liens as existed on said Lexington, Lake & Gulf Railway prior and superior to said mortgage."

The title that Elijah Smith obtained as trustee at the purchase under the foreclosure sale remained in him at the time Newman's intervention was filed, and said Linneus Branch, including said Lexington Lake, & Gulf property, was organized into a new company March 19, 1881—pp. 106, 7, 8, 254 to 259—See testimony of P. Henry Smyth, page 96 (228). The purpose was, at the time that Mr. Smyth testified. as he says, to put this title into a consolidated company—page 96 (229 foot). The two corporations agreed upon a consolidation which was then in process of perfection. The consolidated company representing the bondholders of both the main and branch lines and the bondholders were to be entitled to an equal amount of stock in the new company. The Chicago, Burlington & Quincy Railroad Company was to purchase the stock of the consolidated company, and the arrangement was then to take effect as of some past date, either July or September, 1881.

Upon full hearing upon the pleadings and evidence, there was a decree entered in favor of the intervener, Henry L. Newman—page 30 (67)—adjudging that there was due to Henry L. Newman for himself and as trustee, John Waddell, the sum of $17,750 and interest thereon from November 30th, 1880, at six per cent. per annum until paid; that the claim to that amount was authorized by the court to be incurred by its receiver in the cause, and was by him so incurred and was to have been provided for and paid out of the proceeds of the sale of the railroad property described in the mortgage made to complainants by the Burlington & Southwestern Railway Company, sold November 30th, 1880, by order of the court, and the sale thereof was conditionally confirmed on July 5th, 1881; that the claim not having been paid or provided for, the sale of the road as well as the confirmation thereof was set aside and for naught held, and the receiver of the court ordered to take exclusive possession of the property with any additions or appurtenances thereto absolutely necessary to gain his original possession, with all the powers in him as before vested at and upon the expiration of the 90 days from the date of the decree, unless within the last-named period of 90 days, the claim of the intervener in the sum hereinbefore determined was paid with interest and costs by Elijah Smith, as trustee for bondholders, purchaser at said sale; and if the claim was paid as aforesaid, then the sale would stand and the order of confirmation be final as to said demand. The decree was dated November 28th, 1884.

The receiver has never been discharged.

Mr. Smith did not in any one of his several capacities pay the amount, but as receiver and trustee appeals, with the trustee in the mortgage, to this court.

BRIEF, POINTS AND AUTHORITIES.

I. The contract, dated March 12th, 1880, made by Elijah Smith, as receiver, with Henry L. Newman, for himself and as trustee for John W. Wadell, was one for the benefit of the property then in the custody of the court and, thus, within the power of the court to authorize.

a. The benefits to be derived are strongly portrayed in the receiver's petition for the order. Receiver's petition to borrow money. Record, pp. 64–65; and amended petition, pp. 65–66. It is such as was purchased and the purchase supported by this court in Memphis &c. R. R. Co. vs. Dow, 120 U. S. Rep. 287–301.

b. The authority was vested in the court.

Kennedy vs. St. Paul & Pacific R. R. Co., 2 Dillon R. 448; (S. C.) Dillon R. 519.

Miltenberger vs. Logansport R. R. Co., 106 U. S. Rep. 286.

Barton vs. Barbour, 104 U. S. Rep. 126.

Jerome vs. McCarter, 94 U. S. Rep. 734—738.

Bank of Montreal vs. Chicago, Clinton &c. R. R. Co., 48 Iowa R. 518.

Meyer vs. Johnston, 53 Ala. Rep. 237—338.

First Nat. Bank vs. Shedd, 121 U. S. Rep. 74—86.

Williamson's Adm'r vs. Washington City &c. R. R. Co., 33 Grattan Rep. 624.

c. The application was made on notice and supported by the consent and request of substantially all the bondholders—(rec. pp. 67, 68, 69)—and the bondholders were bound by the order made; also, the Farmers' Loan & Trust Company as trustee for all the bondholders gave its assent to the same, and in its answer joined in the request of the receiver for the authority asked, for the order—page 67—161.

Wallace vs. Loomis, 97 U. S. Rep. 146.

Hale vs. Frost, 99 U. S. Rep. 389.

Fordick vs. Schall, 99 U. S. R. 235—251.

Miltenberger vs. Logansport &c., 106 U. S. Rep. 286, 309, 310.

Union Trust Company vs. Souther, 107 U. S. Rep. 594.

Union Trust Company vs. Walker, 107 U. S. Rep. 596.

Langdon vs. Vermont & Canada R. R. Co., 53 Vt. R. 228.

Humphreys vs. Allen, 101 Ills. R. 490.

The trustee especially represented the bondholders in their request.

Shaw vs. Railroad Co., 100 U. S. R. 605—612.

First Nat. Bank vs. Shedd, 121 U. S. Rep. 74—86.

II. The contract thus made upon performance by Mr. Newman, became an obligation the same as a re-

ceiver's certificate, and became a lien on the proceeds of sale superior to the lien of the bondholders.

a. Because it was made at the request of bondholders and their trustee. Rec. pp. 67, 68, 69.

b. This has been the uniform course of decision in this court. See authorities last cited.

Union Trust Company vs. Illinois Midland &c. Co., 117 U. S. Rep. 434.

c. It was, in effect, a contract of the court itself, and, *debito justitiæ*, the court was required to give it preference and effect.

Fosdick vs. Schall, 99 U. S. Rep. 251.

III. The contract was duly performed by Newman, for himself and Waddell.

a. This is substantially admitted by the answer to Newman's petition. Rec. pp. 15, 16.

b. See also deposition—pp. 91, 92, 93, 94.

c. The quit-claim deed releases the deed-of-trust lien, and has especial reference to it. It also releases all right, title and interest; and it was accompanied by the original note and deed of trust. It was therefore operative upon any and all interest of Newman in the subject matter.

d. The quality of Newman's title was not open to objection, as the particulars of the quit-claim were especially provided for in the contract. Record page 81.

e. No objection has ever been made to either the deed or title, or that Newman has not performed. Nor has the receiver at any time endeavored to relieve himself of the contract by reason of any failure of performance by Newman, and as provided in the contract.

See the answer of trustee and receiver to Newman's petition. Record p. 15 (32)

IV. The claim was properly allowed and the decree equitable and just.

a. The claim of Newman was properly addressed to the court in the foreclosure suit. This was expressly provided for in the contract. Record page 83, near top. It was the usual and proper course.

Turner vs. Peoria & Springfield R. R. Co. 95 Ills. 134, Authorities above cited.

Graham vs. Boston, Hartford & Enc. R. R. Co., 118. U. S. C. R. pp. 177-178.

b. The only parties in interest were the bondholders, and they had requested the agreement; had purchased the road, and were yet holding the title when the petition for payment was filed and decree rendered, and have always since the date of said contract, treated it as their absolute property; and they, in conjunction with Elijah Smith, on March 19, 1881, and while this suit was pending, organized a new company with a capital of $3,000,000, and put into the same as part of its capital

~~stock~~ the property of the Lexington, Lake & Gulf Railway Company, and in part based their capital stock upon the same and treated it as their property—pp. 107-256. *They are the appellants.* Mr. Smith in his capacity *as receiver* was not affected by the decree, and he has as such no right of appeal.

c. The court had especially reserved the power to adjudicate this claim at the time of confirming the sale—Record, page 81 (192)—and could subsequently act on it.

Farmers Loan & Trust Co. vs. Central R.R. Co., 7 Federal Reporter, 537.

Burnham vs. Bowen, 111 U. S. Rep. 776-782-783.

d. The original decree of foreclosure reserved the right of approval of the sale of the deed and the right to make further orders. Record, page 56 (133).

V. The sale made under the foreclosure decree was of the road as *entirety.* There was no effort made to realize anything for Newman's claim on any part. There is no means of determining what any part brought or would bring.

a. Hence the whole sale had to be set aside and the whole road ordered to be resold.

b. This was equitable also. Elijah Smith in his several numerous capacities as receiver, bondholder and trustee for bondholders, failed to per-

form what Elijah Smith, Receiver had agreed to do; and Elijah Smith, as trustee for bondholders, attempted to purchase the road without paying a dollar to relieve the court of its obligation to Newman, and which these bondholders had solicited might be incurred. By this, Mr. Newman has had his title involved and his costs and expenses greatly increased, and for his reparation the whole property of these bondholders should be held liable. It is the equitable and usual way to thus sell the whole road for liens even if the liens are on part only.

Schulenburg vs. Memphis &c. R. R. Co., 67 Mo. R. 442.

Knapp, vs. The St. Louis, K. C. & N. R. R. Co., 74 Mo. R. 374.

Ireland vs. The Atchison &c., R'y Co. 79 Mo. 572.

ARGUMENT.

It appears in this suit that the Lexington, Lake & Gulf Railroad Company was a corporation of the State of Missouri existing before the year 1872, which undertook to build a railroad from the City of Lexington running southward towards the southern boundary of Missouri, and in said enterprise had expended large sums of money and incurred heavy liabilities for the construction of its road, the bed of which had been made, and the most of which had been tied, but not yet ironed. Among the creditors of the company were Monroe & Company, contractors for building the road; and for labor done and material furnished by whom, the co-partnership had given its note to an amount of over ten thousand dollars. In this condition the Lexington, Lake & Gulf Company, on the 7th of February, 1872, was leased in legal form to the Burlington & Southwestern Railway Company in behalf of and for its Linneus Branch; that company uniting the road of the Lexington, Lake & Gulf Company with that portion of the road running from Lexington, on the Missouri river, northward to Unionsville, and styling the whole the "Linneus Branch."

Under the terms of this lease that portion of the road north of the river and the Lexington, Lake & Gulf Railroad property were made one line of road, with one common stock; one franchise; one entire property; and this was to be covered and included in one common mortgage and all known as the "Linneus Branch of the

Burlington & Southwestern Railway Company." In this lease was recited that there were certain liens on the road, and the Burlington & Southwestern Railway Company took the Lexington, Lake & Gulf property, subject to these incumbrances. Moreover, by the very terms of the lease the bondholders took their bonds with full knowledge and notice of these prior liens; for under the lease and articles of consolidation made May, 1873, these bonds were subject to these liens, and by the terms of these agreements the Burlington & Southwestern Railway Company agreed to pay the *liabilities* of the Lexington, Lake & Gulf Railway Company to the extent of twenty thousand dollars, which included, as shown by the evidence and admitted by the answer, the debt of Newman, appellee. The recitals in this lease, and the deposition of Davis, show also that, at the date of the lease and the placing of the mortgage upon the Linneus Branch (including said Lexington, Lake & Gulf property) *in its entirety*, to secure $1,600,000 in bonds thereon, there had been about eighty-five miles of said Lexington, Lake & Gulf road graded, bridged and tied, at a cost of about $600,000, and that but very little work had been done at that time upon that part of the branch road *north* of the river, with no iron; and that the most important and valuable portion of this line, and the chief, and in fact about the only security for the $1,600,000 bonds so issued, was that part of the branch road *south* of the river. The evidence further shows, that by a willful disregard of the provisions of this lease, and a perversion of the

funds placed in the hands of the Burlington & Southwestern Railway Company, of which Elijah Smith was then President, the $1,600,000 in bonds were used to build and iron the part of the road *north* of the river; that the means of doing this came mostly from the Lexington, Lake & Gulf property, then improved to the extent of $600,000, and that the bondholders, including the receiver, who is shown to be also a large bondholder, have thus derived a great benefit out of the property *south* of the river, while they have never paid one cent or done one dollar's worth of work thereon; nor, before or since said property went into the hands of the receiver, complied with a single agreement made. But as is proven they have used the property *south* of the river to build, iron and equip that portion *north* of the river, and having thus reaped all the benefits to be derived therefrom and destroyed its value, by delays, and evasion, are now endeavoring to get rid of their liabilities therefor. The value of the road being gone and its rights of way endangered under the law, they cooly asked in their answer to be relieved from their obligations to the intervenors, under a contract made by the court itself, at their solicitation.

Before the execution of the mortgage by the Burlington & Southwestern Railway Company upon the Linneus Branch, the Lexington, Lake & Gulf Company had made the note to Monroe & Co., hereinbefore mentioned, and secured it by a deed of trust in ordinary form upon that portion of the road built by the Lexington, Lake & Gulf Company. On April 1st, 1872, and after the execu-

tion of the deed of trust to Monroe & Co., the Burlington & Southwestern Railroad Company executed its bonds for $1,600,000, and secured the same by a deed of trust or mortgage upon the *whole* of Linneus Branch *as one entire property;* that is, upon the whole of the road running from Unionsville to the Missouri river, and thence by Lexington *southward* toward the southern boundary of Missouri; so that the Lexington, Lake & Gulf Road, at this time, was covered by two deeds of trust: first, the mortgage to Monroe & Co., for over $10,000, (the claim Newman owned,) and secondly, the mortgage of the Burlington & Southwestern Railway Company for $1,600,000.

Moreover, the Burlington & Southwestern Company was under a legal and equitable obligation, by force of the lease and articles of consolidation, to pay the claim of Monroe & Co., the contractors who had done labor and furnished material for the construction of the Lexington, Lake & Gulf Railway. The note of Monroe & Co. was sold and assigned to H. L. Newman, who held the same for himself and as trustee for John W. Waddell.

The debt to Monroe & Co. having been paid by neither the Lexington, Lake & Gulf Company, nor by the Burlington & Southwestern Railway Company, due proceedings were instituted to foreclose the deed of trust securing this Monroe & Co. debt, and a deed was made by the trustee, pursuant to the powers in him vested. This was done by no judicial proceedings, nor was possession taken or attempted to be taken by the trustee or given to Newman. The whole road, the right of way, &c., of the Lexington, Lake & Gulf Company was thus

conveyed to H. L. Newman for himself and as trustee for Waddell. In the meantime the foreclosure suit, in which this intervention is made, was commenced by the Farmers' Loan & Trust Company, the trustee of the deed of trust on the Linneus Branch; made by the Burlington & Southwestern Railway Company, for $1,600, 000; and such steps were taken therein against the Burlington & Southwestern Railway Company that a decree for foreclosure was obtained in April, 1876, and Elijah Smith was appointed receiver of the whole road. This receiver having assumed the control of the road and being in the performance of his duties as custodian of the property under the orders and jurisdiction of the court, learned that Newman was negotiating for a sale of his property to one Brown, for a large sum of money. Thereupon Smith, as receiver, applied to the court, in the foreclosure suit, and by representing that Newman had no interest in the property and that he was intermeddling in the same, obtained an injunction against him and against Brown who was proposing to purchase. These proceedings resulted in a disruption of the negotiations between Brown and Newman and prevented the sale of the property in the manner contemplated. These facts are found by the court below, and Judge Brewer, in his opinion comments on them as a part of the history of the case—Record, printed page 29. Thereupon Smith, as receiver, *entered upon negotiations* with Newman for the *purchase of Newman's interest* in the property, and Newman having objected that the court had not authorized the purchase of his claim,

Smith as receiver, by his solicitor, Mr. Smyth, applied to the court for authority to settle and purchase all outstanding and adverse claims, and the authority was granted.

The attention of the court is particularly called to the proceedings on part of the receiver, which resulted in making the order, under which the claim of the intervenors comes before this court. The receiver in his petition and amended petition for this order, states therein and makes oath to the following state of facts—in the words of said petition—printed Record, pp. 64, 65:

"That said Lexington, Lake & Gulf Road was acquired by said Burlington & Southwestern Railway Co. under a certain lease, and is depreciating in value; that if completed it will be of great value to the parties in interest, and that the circumstances are such that it should be completed *at once*, and before the sale and confirmation under the decree in the case can be had; that by reason of the contract with the Lexington, Lake and Gulf Company the statutes of Missouri requiring railroads to be completed in a certain time will work a forfeiture of said property; and that said road-bed and bridges are rapidly going to decay, and *the field threatened to be occupied by a rival line, which will destroy the value of said property.* It is important that said road should be ironed and equipped *at once* to protect and preserve and save the said property to the parties in interest, and that the receiver has served parties in interest with notice, and that there is no opposition thereto, and that the interest of all parties will be much

enhanced by commencement of work *immediately* on said road, and that without *immediate action* by the court, said benefits to be derived from the completion thereof will be lost to all parties in interest, and to, probably, the entire loss of the property, *which has over $600,000 expended upon it to put it in its present condition.* And petitioner believes this order and authority necessary to save said property from deterioration and final loss, and that authority be given to issue on said property receiver's certificates to an amount not exceeding $500,000, and that said indebtedness and certificates so created shall be a lien upon said property only, and said lien shall be *prior* to all other *liens* thereon."

As a supplementary part of the said petition, and distinct and separate from the part before recited, said receiver also asks for general authority to adjust claims, &c., in words as follows:

"Your petitioner also asks for authority to settle and adjust, by payment *or purchase*, any claims against said Lexington, Lake & Gulf Railway Company which may seem to be prior or adverse to the claims of the Burlington & Southwestern Railway Company *under the contract* by which said Lexington, Lake & Gulf property *was acquired.*" * * * * * * *

To these petitions, the Farmers' Loan & Trust Company, the Burlington & Southwestern Railway Company, and *the bondholders*, filed answers and consented thereto, and asked "that all the authority prayed for in both the petition and the amended petition be granted as prayed for, and to all of which they assent."

The order of the court was made on the 3rd day of March. By this order authority was given to build this road at once, and to build as prayed, and that receiver's certificates be issued to an amount not to exceed $500,00, and they were made a *first lien* and *prior* to all other liens upon that part of the "Linneus Branch" south of the river. This portion of the order is complete and separate from the other portions of the order, and had for its objects and purpose building said part of said road *south* of the river.

We quote from the order (Record, printed pp. 69-70): "The application of Elijah Smith, the receiver heretofore appointed by this court, for authority to borrow money and construct an unfinished portion of the railroad of defendant from Lexington southwardly, and for other authority, as appears in his petition and amended therefor, came on for hearing before the Hon. Geo. W. McCrary, circuit judge at chambers in the city of St. Louis, on the 26th day of January, 1880, and it appearing that the complainants and defendants in said cause had been duly notified of said application and have filed answers consenting to said order, and that it is proper that the same be granted as asked for in the petition and amended petition; it was therefore ordered by said circuit judge that the prayer of said receiver be granted upon his obtaining the written consent of two-thirds of the bondholders interested in said mortgage and the concurrence of the Hon. A. Krekel, one of the judges of this court; and now, on this 3d day of March, 1880, said application coming on for further hearing before the

Hon. A. Krekel, at his chambers, Jefferson City, and it appearing that said receiver has obtained, in writing, the consent of the requisite number of the holders of said bonds, it is ordered and decreed that the authority prayed for by the receiver be granted, &c. The order then directs the construction, &c., of the road south of the river."

Following this portion of the order is the genera authority as prayed for in said petition by said receiver *relating to the entire branch line and in its entirety.* This portion of the order is *distinct* and *separate* in its purpose and object from the preceding portion, and is in words as follows:

"And the said receiver is further authorized and directed to settle and adjust, by payment or otherwise, any outstanding claims against the Lexington, Lake & Gulf Railroad Company which may seem to be prior in right to the claims of the Burlington & Southwestern Railway Company *under the contract before* mentioned, and *to purchase in any* outstanding or adverse lien or title to any portion or all of said property, and any right or title so acquired to be conveyed to him as receiver for the benefit of the parties in interest herein."

It is submitted to the court that the purposes and objects of the petitions and the order thereunder were twofold, but separate and distinct.

1st. To build the road, and make the receiver's certificates a first and specific lien only upon that part of said road, south of the river.

2d. To pay or adjust any claims, liens or adverse title to said property, on or against said Lexington, Lake & Gulf property *generally*, under the original contract, and without reference to any specific fund arising from any part or portion of said Linneus Branch, but as a debt assumed and justly due by said Burlington & Southwestern Railway Company for said branch.

And it was under this state of the case, and for these purposes and objects, the contract between Smith receiver, &c., and Newman, of date March 12, 1880, was made. This contract recites that it is "made by said Smith as receiver, acting under the authority of the Circuit Court of the United States, in the case of the Farmers' Loan & Trust Company vs. Burlington & Southwestern Railway Company et al., and under and *pursuant* to the *order* of said court." This contract was of the same binding force as a receiver's certificate. Either is a contract to pay money for value received; and this Honorable Supreme Court has too clearly announced the validity and priority of these engagements to allow any further question now. We have cited the precedents under our "Points and Authorities" of this abstract and brief, page 18, for roads not finished, branches constructed and improvements made. Contracts and liabilities created for roads not finished, branches constructed and improvements made have been given priority over even dissenting bondholders; while in the present instance, the bondholders were requesting, urging and sanctioning the order and contract. These bondholders were the real owners of the entire property,

subject to Newman's title, both north and south of the river.

The order of the court became a part of the contract. Newman had the right to look to the same as such and to agree with Smith with reference thereto. The receiver, by the terms of the order, was "authorized and *directed* to adjust and pay said claim," not out of any specific property or fund, but *generally*, as the receiver of the road; and there was no restriction or limitation as to any property out of which he should pay. Whilst in the contract the receiver had the option to pay the $17,750 "out of the moneys coming into his hands from that part of the said road south of the river, or from the sale of receiver's certificates, or from any earnings from that part of said road;" yet not having done either within the time stipulated, the intervenor had the right to have the order enforced under which the contract originated, or under that clause of the contract that says that said receiver is "to pay said Newman out of the moneys coming into his hands from said road, or *arising from the sale thereof.*"

The contract is in the nature of a *guarantee* by the receiver that the agreed sum would be paid, whether the road was sold for bonds, cash or otherwise; that the same was taken for $17,750 and that would be paid for it whether worth it or not at the date of the foreclosure sale. It was intended to be an adjustment of the previous undertaking of said Burlington & Southwestern Co., and a final and complete settlement of all matters and things recited in the contract, and that said sum would be paid

upon making the sale under the decree if not paid as otherwise indicated in the contract.

Mr. Newman was to put his deed and the old Monroe & Co. note and mortgage in the hands of the person agreed on, and await payment from the sale or otherwise. He punctually performed the conditions required of him. The receiver never has denied this. He has never claimed any forfeiture of the contract; but on the other hand admits the full force of Mr. Newman's claim. But he says, inasmuch as Mr. Newman was to be paid out of the proceeds of a particular portion of the road sold, and inasmuch as this portion was sold with all the other portion and as an entirety, for bonds only, therefore there was nothing realized from the particular portion liable, and hence Mr. Newman takes nothing by his contract. The solemnity of this result is intensified by the fact that Mr. Elijah Smith who made the contract, as receiver, became the purchaser of the property as trustee for the bondholders.

Surely the appellee was not to see that the receiver at the sale secured the ways and means to pay the price agreed on. The trustee for the bondholders, and the bondholders themselves, had procured this contract and they knew of its binding force. The receiver who made the contract was the purchaser for the bondholders and was himself a bondholder. The title was in him after the sale, at the time Mr. Newman's petition was filed. The obligation of the contract with the appellee was a lien on the property purchased, and the purchasers were bound to relieve the court of this liability at the same

time they demanded the road. They were ignorant of neither the law nor the facts. It was in a word a debt of their own creation, and they could not reap the advantage of their purchase without performing the correlative duty of payment.

The order was obtained under circumstances that entitle it to the freest and broadest construction in favor of the intervenor. In the first place it was the voluntary request of the receiver himself that the order might be made. An order he had prepared the way for, by breaking up a sale Mr. Newman was just then about to make. The court hesitating to grant him the order in the form that he wished, demanded at least two-thirds of the bondholders should join in the request for the order. This request of the bondholders was obtained. The order having been made, Newman for himself, and as trustee for Waddell, made the agreement upon which this intervention is based, and thereby sold to Smith, as receiver, the road-bed and appurtenances of the Lexington, Lake and Gulf Company, for the sum of $17,750. This sum Smith, the receiver, promised to pay either in receiver's certificates or *in the proceeds of the sale* of that portion of the road originally covered by Newman's claim. This last provision, that Newman was to be paid from the proceeds of the sale, is distinctly expressed, and has never been modified. Newman performed all the conditions on his part to be performed under this agreement, but Smith, the receiver, having obtained the order of sale from the court for the whole of the road from Unionville to Lexington, and from Lexington to the

south, covering the whole of the Linneus Branch, and providing that at the sale the purchaser might pay for the said road in bonds *or money*, proceeded to sell the whole of the said railroad *without discrimination or partition*, and took in payment the *bonds* of the Burlington & Southwestern Railroad secured by the mortgage foreclosed, a large part of the bonds being owned by Smith himself. No money was demanded or received as part of the purchase price, and only a small sum was voluntarily advanced for expenses. The master reported the sale so made to the court. Some time elapsed between the report of the sale and the approving order—and during this period Newman filed his intervening petition. The court approved the sale, *reserving expressly, however, its right and jurisdiction over the property for further consideration and for further orders in regard to oustanding claims.* The record of the order approving the sale will clearly show this provision of reservation, and that it is aptly worded to apply, as no doubt it was intended, to the Newman claim. The appellee in his intervention, requested the court to set aside the sale of the road under the inequitable circumstances stated, and to require a sale whereby there should be realized an amount of money sufficient at least to satisfy his claim, with interest from the time specified in the petition.

It further appears that Mr. Smith, as receiver, by the order to adjust the claim of the intervenors, was further authorized to issue receiver's certificates sufficient to pay that claim with other matters. But he failed to issue any

certificate whatever, or tender or offer any to Mr. Newman, and did so conduct himself from the time of the contract with Newman up to the present decree, as to give good ground to suppose that his chief object was to entrap Newman into an agreement and hold him at arm's length under that agreement until he, Smith, might carry into effect his own design for his own benefit as bondholder, and get the property so entangled in further conveyances as to ultimately defeat Newman from enforcing any claim whatever, or at least from any realization on his claim. An explanation, though no excuse for this conduct may be found in the fact that during the time that Newman was thus held in the agreement, another road had been built a short distance from the present road; so that while at the time Smith was negotiating for the purchase from Newman, Newman's claim might have been sold for much more than its face value offered by Smith, the receiver, it has now become comparatively worthless, and as a piece of property, *separate from the remainder* of the road called the Linneus Branch, would produce to Newman little or nothing; at least not the amount that is claimed, or the half of it. The field was threatened by a rival, as the receiver informed the court in his petition for the order. Yet the contract was sought and made. Because that rival's threat has been carried into effect is no reason Mr. Newman's sale should be cancelled and his property thrown back on his hands. This would be the grossest injustice.

This case being somewhat peculiar in some of its features, we beg leave to again refer to the opinion of

the learned judge below. Judge Brewer says (Record, printed p. 29): "When negotiations were pending for a sale by intervenors, the receiver, representing the entire properties, deemed it of sufficient value to interfere by injunction, break up the negotiations and prevent the intervenor from realizing on his claim. Subsequently he deemed it of sufficient value to apply for and obtain authority to borrow $500,000 on receiver's certificates to complete the road and further authority to purchase the claim of intervenors. After thus baffling and delaying them it may not be inequitable to hold that the road *as a whole* should bear the burdens and losses of delays; but it is not necessary now to determine absolutely the rights of the parties. It is enough to hold that the sale of the property as a whole should not stand with the receiver's obligation on a part unsatisfied."

It further appears that Smith, the receiver, being a bondholder of Burlington & Southwestern Company, himself purchased the title at the sale when the Lexington, Lake & Gulf portion of the Linneus Branch was sold, in conjunction with the remainder of that branch, and that he has since conveyed all this to a corporation in which he has become one of the chief stockholders, and that these interests have now come into the Burlington & Quincy Railroad Company, which has issued bonds to the original stockholders, guaranteeing them a fair interest upon their investment; in a word, that the title of the Lexington, Lake & Gulf Company has passed over from Smith, the receiver, through these

manipulations of the orders of the court for Smith's own individual benefit and that of other bondholders, while he has failed and refused to in any degree perform his duty toward Newman under the contract of the court through him as receiver. The chief facts stated in the petition and here recited are not denied; but it is explicitly averred that Newman has a first lien upon that portion of the road built by the Lexington, Lake & Gulf Company, and the argument is that if Newman has any remedy, it is simply the right to have his agreement specifically enforced as a lien against that portion of the road.

It would be a strange result to occur in a court in equity, under an agreement made by an officer of the court, by authority of the court, with a party who had originally had a lien, who had been at the expense and delay of enforcing that lien, and acquiring a legal title, and who had sold that legal title, under such agreement so authorized to the legal custodian of the property appointed by the court, that, when he claimed in the court the performance of the contract he should be returned to his original condition, and informed that his only remedy was to re-enforce from the beginning his original claim in some other court and by an independent suit.

In the first place, this would be no remedy. The property, out of the proceeds of the sale of which this claim was to have been paid, has been transferred to other parties, and the title much entangled, and the rem-

edy made extremely precarious, if it has not been absolutely destroyed.

In the second place, by means of the delay of these proceedings and of this contract, while Mr. Newman was awaiting the justice and equity of the court in regard to its own agreement, the property has lost its value by the rivalry of a company which has built alongside of it during the time. It was to save the property from this rivalry that the court authorized the contract of purchase. The receiver is in no position to throw his unsuccessful management on Mr. Newman.

In the third place, it is not necessary upon authority, that this roundabout method should be forced upon this intervenor, inasmuch as the court had it within its power to do justice in a summary manner as against these bondholders who petitioned that this order might be entered. The court had before it the contracting parties, the purchaser, who was one of the contracting parties, and who *in making the contract* in fact represented *the subsequent purchasers* as much as he did *in the purchase itself*. And it had the road yet within its control, having expressly reserved it in the affirming order. The court had full and ample jurisdiction over the parties, and the subject matter, and within its control the successors of the original trustee. In point of fact and law the sale had made no essential difference in the relative situation of the parties to the property on which the decree was to operate.

Lastly, this property was sold in its *entirety*, and by the very terms of the sale is made an *entire property*,

and not susceptible of division, and being an entirety should not be sold in parcels. This is the established rule in Missouri, as shown by the authorities cited in our "Points and Authorities."

It must be borne in mind that the court ordered a sale under such circumstances that there might have been realized cash sufficient to have paid Mr. Newman, because the order was to sell for bonds or *money;* that the Master in Chancery did, in fact, sell the whole of the road, Newman's part as well as the rest, without distinction; that Mr. Smith, himself, became the purchaser, and put in, in large part, his own bonds to pay the price; and that it has been simply through the indisposition of Mr. Smith as receiver, as trustee and individually, to comply with his agreement, made under the sanction of this court, that Mr. Newman remains unpaid. It does not lie in the receiver's mouth to say that that portion of the road covered by Mr. Newman's claim was not worth the amount that he had agreed to pay Newman for it. It is in evidence that that portion of the road had cost a very large sum of money, and was at the time that the agreement was made with Smith, in such condition that Newman might have sold it for a large sum had the receiver not interfered against him by injunction. Moreover, the court will presume that the road was worth at least as much as the receiver agreed to pay for it, and which he agreed to pay for it under an order solicited by the bondholders and by the trustee, who represented the bondholders, and who would not have been so solicitous to have the claim

settled, had it not been worth the amount set upon it by the parties making the agreement. In the very petition of the receiver for the order of sale, he narrates the fact that the road had cost $600,000 as inducement to the court to make the order. We have abave quoted Judge Brewer's remarks on this point, and will not attempt to add to their force.

The sale was made; but the proceeds which should have been brought into court were willfully refused. Were this a controversy between man and man, it would seem hard to force Mr. Newman to a court of justice under so plain a case; and a man would be deemed dishonorable who refused so willfully to perform an agreement, as Mr. Smith has done in this instance; but when one reflects that this party thus contumaciously refusing to do that which he had agreed to do, is an officer of the court, the representative of the parties in interest, and that he is acting under the sanction of the court, and was not only authorized but was *directed* to *settle this claim*, and that having settled it he now refuses to pay it, it would be an outrage upon justice and the conscience of a court, to allow him to succeed in his insolent disregard of his duty and the intervenor's right.

That the court has the power to control the receiver and this property and the bondholders, so as to compel them to either pay Mr. Newman the amount they should have paid at the sale, or to set aside the sale of *this entire road*, and have it sold *de novo*, so that it shall bring at least as much cash as will pay Mr. Newman, is well supported by authorities. The judges of the United States,

both in the Supreme Court and on the Circuit, have found it necessary to establish, in regard to properties put in the hands of receivers under foreclosure proceedings, new principles for their guidance, which shall be efficacious to preserve the rights of all in interest, those whose contracts and services better the condition of the property after the foreclosure proceedings have been commenced, as well as those of the bondholders and trustees under the mortgage. This has led to the well known principles established by these courts whereby those performing labor upon the road or furnishing supplies to the receiver acquire a lien therefor which is even superior to the first mortgage lien. In the present instance the incumbrance being upon this property in favor of Newman, a superior title existed in him whereby the improvement of this road was about to be impeded or the sale of this whole branch greatly depreciated. It was a *betterment*, within the strictest sense, for Mr. Newman to surrender the superior title to the receiver, and agree to take in lieu thereof the cash which was contracted for. This was agreed and Mr. Newman has performed the agreement on his part. All that has happened is that Mr. Smith, the receiver, has not paid for it. He acquired the *benefit, the improvement*, the *betterment* of this property, to the extent of Mr. Newman's title. All this has been tendered him, but he ineqitably and unjustly refuses to bear the burden of this agreement. He was hot to make the contract when he knew it was valuable as he states under oath in his petition for the order; he is cold to perform the contract made when he imagines the rival

line has destroyed this value by a parallel road. He cannot, however, legally or successfully thus play fast and loose.

The principles upon which we rely, of this general nature, are to be found in the case of Fosdick vs. Schall, 99 U. S. Reports, 235-251; and also in Hale vs. Frost, 99 U. S. Reports, 389, and the numerous cases following these. We cite also a very important and carefully considered case, that of Williamson's Administrator vs. Washington City, &c., Railroad Company, 33 Grattan Reports, 624. Other authorities are set forth in our "Points and Authorities" above.

In the opinion of this Honorable Court in Miltenberger vs. Railway Co., 106 U. S. Rep. p. 286, on page 311, it is said: "Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property, for receivers to pay pre-existing debts of certain classes, out of the earnings of the receivership or out of the *corpus* of the property, under order of the court, with a priority of lien," and the court illustrates anew the source and necessity of its jurisdiction in this regard. The principle is settled, and has direct application to the case in hand.

Another case which comes very near to the present one is that of the Farmers' Loan & Trust Company (the very plaintiff in this suit) vs. Central Railroad of Iowa, 2 McCrary Reports, page 181. The opinion of Judge Love in this case was concurred in by Judge McCrary, and it is there held, that although the road had

been sold by the receiver and the receiver discharged, yet, inasmuch as the court in that case, as in the present one, *had retained the jurisdiction of the property for further orders*, that in behalf of a person who had a claim against the company because of personal injuries received through the negligence of the company, the court would require of the bondholders the payment to the injured person, or it would set aside the sale of the road and require a re-sale, so that this party might receive from the proceeds sufficient to compensate him.

We submit, that, if the Circuit Court in view of these superior equities which exist in favor of Mr. Newman, found a precedent so strong as this, announced and concurred in by the very judges of that jurisdiction, and it found in its order affirming this sale the *reservation of a control over this property*, and perceived that the bondholders who solicited this agreement might be made, failed to furnish the means to pay the claim, the court might well order, not that this claim shall be enforced against that portion of the road originally owned by the Lexington, Lake & Gulf Company, *but that the whole sale should be set aside, from end to end, on the whole Linneus Branch, and that a re-sale should take place, with the provision already in the order of sale, that there shall be realized thereat an amount in cash at least sufficient to pay the claim of the intervenors herein, unless the bondholders within a fixed time should furnish the means to pay off and liquidate the claim.* With a clear appreciation of the justice of this claim by the court, and the control over the person of the receiver, who has not

yet been discharged, and of the property, which is yet within the power of the court, we think that such an order was doing simply justice not only by the court to the intervenors herein, but justice to the court itself.

The application of the intervenor is to Justice, and, if his claim was ever sanctioned by her, he cannot fail to be protected in any court where her ministers preside.

John W. Noble.

JOHN W. NOBLE,
JOHN C. ORRICK,
TILTON DAVIS.

Counsel for Appellee.